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CONTAINING

Cases determined by the Court of Judicial Commissioner, Ajmer-Merwara, and important Notifications applicable to Ajmer Merwara

Editor.

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AJMER.

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REVIEW

All India Digest, 1929—*Published by the Madras Weekly Notes Office, 3 Temple Chetty Street, G. T. Madras. Columns 1—ex plus Index. Foolscap.*

This is an All India Digest of almost all cases reported in all the Indian Law Reports, in Indian LAW JOURNAL and Journals published from some important Indian states like Mysore, Travancore and Cochin. A few Privy Council cases dealing on Indian Law have also been digested. The Digest in about twenty five pages.

A Table of cases Digested, Referred, Distinguished and overruled and a List of the Indian cases Referred to is given at the beginning.

The publication is issued in monthly parts and a consolidated Digest for the whole year is issued at the end of the year.

Considering the fact that the Digest is published by the leading office of MADRAS WEEKLY NOTES we are sure of its continuity and increasing utility. The arrangement and printing leaves nothing to be desired.

JYOTI SWARUP GUPTA

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THE AJMER MERWARA LAW JOURNAL, 1939—PART I.

Alphabetical Index of cases reported.

Subject Index of cases reported.

Ajmer Laws' Regulation (III of 1877):

—S 33—The rule of Damdupat cannot be avoided by an agreement that interest shall be treated as principal—But subject to that there is nothing to prevent parties contracting when the accounts are made up that interest shall run on the whole sum then due on the original principal. **29**

Cantonment Act (II of 1924):

—SS 44 (1)(e), 55 (2) and 68 (a)—Assessment Committee appointed under S 68 (3) consisted inter alia of two members nominated by an outsider—

Held the committee was not validly appointed—*Held further* this defect was not cured by S 55 (2) and the assesment proceedings were illegal and liable to be quashed 1

S 69—Amount of assesment not entered—This illegality materially affecting the merits of the case and not merely irregularity 1

—S 68 (a)—*See* S 44 (1) (c)

—S 84 (2)—Several appeals—Single reference is irregular

—S 99 (2)—Water tax—Is payment for water and not tax on property 1

—S 104—List failing to show that, which the law expressly directs to show—This illegality and not merely an irregularity such as might be condoned under S 104

Civil Procedure Code (V of 1908):

—S 47—Moveable property attached—Then released—Question of the return of that property must be decided in execution proceedings 25

—S 47—Moveable property attached—then released—Court bound to give applicant every aid in recovering the property when the attachment has been removed. 25

—S 47 and O 21 R 2—Compromise to pay decree by instalments—Instalments in arrears—Suit filed—*Held* Executory contract is not adjustment. Hence decree subsists and the suit was barred by S 47 21

—S 48 and S 152—Application for amendment must be made before it becomes barred by limitation. 28

—S 115—Interference—when no grounds or manifestly unfair result. 17

—S 151—Case may be re opened before judgment is pronounced 17

—S 152 and S 48—Although there is no limitation for an application to amend a decree under S 152 such application must be made before the decree has become un-executable owing to twelve years limitation provided by S 48 27

—O 21 R. 2, and S 47—Compromise to pay decree by instalments—Instalments fell in arrears—Suit filed for recovery of these instalments—*Held* Executory contract is not adjustment—Hence decree subsisted and the suit was barred by S 47 21

Criminal Procedure Code (V of 1898):

Criminal Trial:

Evidence Act (I of 1872):

—S 73—A Judge is not an expert in hand writing and although the law allows him to compare a disputed signature with an admitted signature he ought not to attach too much weight to such comparison 34

—S 103 - Deposit —Burden of proving any particular transaction to be a deposit lie on the person asserting 6

Interest:

—Accounts made up—Parties can contract that interest will run on whole sum then due—But the rule of Dumdupat cannot be avoided by such contract 29

Hindu Law:

—Partition—Property mortgaged with possession—It need not be joined in suit for partition 12

Limitation Act (V of 1908):

—S 20—Part payment need not be in actual cash—Test is whether payment would be an answer to a suit brought by the creditor to recover the amount. 23

—Art 60—The burden of proving any particular transaction to be a deposit lies on the person asserting it 6

—Art 60—Deposit and agreement or relationship of banker and customer must be proved—If a trader acts as a banker strict proof is necessary—Initiative of transaction no test. 6

—Art 60—Agreement —Implied when relationship established 6

Penal Code (XLV of 1860):

—S. 447—Colourable title not sufficient—Dispossessing one in peaceful possession for substantial time amounts to offence 43

Practice:

—Procedure—Party should be given opportunity to consult his counsel before being asked to make any decision. 17

THE
AJMER-MERWARA
LAW JOURNAL
1939

January 1, 1939 to December 31, 1939 | SECTION I—REPORTS. | *Every Section has a separate paging*

BEFORE MR. D. R. NORMAN, I C S.

Cantonment Board, Nasirabad . Appellant

Versus

Shri Narain and *others* Respondents.

Misc. Civil Case No. 86 of 1938, decided on 6th December 1938, arising out of Reference made by the Income-tax Officer, Ajmer, in the matter of the Cantonment Act, (II of 1924)

(a) Cantonment Act (II of 1924)—S. 84 (2)—Several appeals—Single reference irregular.

A single reference in several appeals is irregular. Either references should be made in all the appeals or a reference be made in one appeal and then all the appeals be decided in accordance with the answer received

[*Para 3.*]

(b) Cantonment Act. (II of 1924)—S. 66.—Amount of Assessment not entered—This illegality and not mere irregularity.

The omission to enter in the list framed under S 66 the amount of the assessment is an illegality materially affecting the merits of the case

[*Para 8*]

(c) Cantonment Act (II of 1924)—S. 104—Irregularity or illegality.

When a list fails to show which the law expressly directs to show, there is an illegality and not merely an irregularity such as might be condoned under S. 104,

[*Para 7.*]

(d) **Cantonment Act (II of 1924)—S 44 (1) (e), 55 (2) and 68 (3)—Board cannot delegate its power of appointment—Some members of Assessment Committee not validly appointed—Proceedings of such Committee illegal**

Assessment committee appointed under S 68 (3) consisted *inter alia* of two members nominated by an outsider *Held* the committee was not validly appointed *Held further* this defect was not cured by section 55 (2) and the assessment proceedings were illegal and liable to be quashed

[*Para 10*]

(e) **Cantonment Act (II of 1924)—S 88 (2)—Water tax—Not tax on property**

Water tax is payment for water received and is not a tax on property

[*Para 11*]

Mr Madan Mohan Kaul—For Appellant.

Mr Mukat Behari Lal Bhargava—For Respondent.

Order—This is a reference under section 84 (2) of the Cantonment Act from the Income tax Officer who is the officer specially empowered under section 84 (1) of that Act to hear appeals against assessments. The facts are briefly as follows:—

2 The Cantonment Board prepared an assessment list under section 66 of the Act in the form prescribed by the Provincial Government. In that list columns 12 to 19 were left blank Objections were referred to an Assessment Committee appointed by the Board under section 68 (3) By resolution of the Board that Committee consisted of certain persons nominated by the Board and also of "two senior Officers from the Lincolnshire Regiment to be nominated by the Officer Commanding Station This reference arises out of three appeals against the decisions of the Assessment Committee *The questions referred are*:—

(1) Whether the omission to fill columns 12 to 19 of the preliminary list published for objections was an illegality materially affecting the merits of the case?

(2) Whether the disposal of objections by an Assessment Committee, constituted as above renders the entire assessment proceedings of the Board illegal and liable to be quashed?

(3) Whether the water tax is a tax on property within the meaning of section 99 (2) of the Act ?

3 Stopping here I must point out that a single reference in three appeals is irregular. The Income-tax Officer should either have made three references or should have made a reference in one of the appeals, and then decided all three appeals in accordance with the answers received As however the questions arising are the same in each reference my judgment should be treated as if it were a judgment arising out of three consolidated references

4 The first question arises because in my view the form prescribed by the Provincial Government under section 66 is faulty Section 66 runs as follows —

"When a tax assessed on the annual value of buildings or lands or both is imposed, the Board shall cause an assessment list of all buildings or lands in the Cantonment, or of both, as the case may be, to be prepared in such form as the Provincial Government may by rule prescribe"

Clearly therefore the list must show the assessment i e the actual amount of the tax payable and should also show the annual value "Annual Value" is defined in Section 64 and means either the actual rent or, where the land is not let or is let for a sum less than its fair letting value, the sum at which it might reasonably be expected to be let

5 I now come to the form prescribed Columns 1 to 11 are grouped under the general head "Annual value of the property" Columns 1 to 9 are not here relevant Column 10 is headed "As indicated by Act II of 1924 section 64" and therefore shows the valuation on which the taxes are assessed Column 11 is headed "As determined by enquiry as to the letting value of a similar property in the same locality" Presumably such enquiry is made to ascertain whether the actual rent is a sum less than the fair letting value of the property, and the column therefore contains one of the data from which the sum

indicated in column 10 is calculated. Why it should be placed after column 10 is not obvious However this point causes no difficulty because, for some reason which the Assistant Public Prosecutor is unable to explain, the figures in columns 10 and 11 are invariably the same Column 12 is headed "The gross annual letting value finally fixed by the Assessment Committee' Columns 13 to 18 come under the general head "Half yearly tax calculated on the figures in column 12" and specify the various taxes, namely house, conservancy and water

6 Stopping here, it is obvious that if the first question be taken literally the answer must be in the negative, since it is impossible to fill up columns 12 to 19 until the Assessment Committee has considered objections This point the Income tax Officer failed to notice But I apprehend the real question which I am asked to answer is whether the assessment list prepared under Section 66 is legally valid.

7 In my judgment it is not legally valid because, due to the absence of appropriate columns it nowhere shows what it is expressly intended to show, namely the actual amount of of the tax which the assessee is to pay The Assistant Public Prosecutor argues that, as it shows the annual value in column 10, and the headings of the columns 13, 14, 16 and 17 show the percentage at which the various taxes will be levied, it was possible for the assessees themselves to calculate what their taxes would be This is true but is not in my view an adequate answer Some of the assessees may not be sufficiently intelligent, and I have observed that in each case the first complaint of the assessee is that the list does not show what his assessment is When a list fails to show which the law expressly directs to show, there is an illegality and not merely an irregularity such as might be condoned under section 104

8 My answer to the first question therefore is that the omission to enter in the list framed under section 66 the amount of the assessment is an illegality materially affecting the merits of the case

9 I now come to second question It is conceded that the Board could not delegate its power of appointment to the Officer Commanding the Station But it is argued by the Assistant Public Prosecutor that the irregular appointment of two members was cured by section 55 (2) which enacts that no defect in the nomination of a member of any committee of a Board shall vitiate any act of that committee if the majority of the persons present at the time of the act were duly qualified members The Income-tax Officer thought that this section did not apply because "Committee of a Board" meant a committee appointed by the Board under section 44 (1) (e)

10 One argument in favour of this view is that as section 55 occurs in the same chapter as section 44 there is some presumption that it refers to committees appointed under that chapter and not the committees appointed under the provisions of some later chapter Another argument is that "Committee of the Board" must mean a Committee consisting of members of the Board, whereas it is expressly provided in section 68 (4) that it is not necessary to appoint to the Assessment Committee any member of the Board I think that both arguments have some weight and in particular the second In the absence of any definition of the expression "Committee of the Board" I agree with the view taken by the Income-tax Officer. It follows that as the Assessment Committee was not validly constituted and as this defect is not cured by section 55 (2) the assessment proceedings of the Board are illegal and liable to be quashed

11 I now come to the third question The Income-tax Officer thought that a water tax was a tax on property because

it was assessed on property and because its payment was a charge on property Neither of these reasons are valid To assess it on property is merely a convenient way of calculating it and to make it a charge on property a convenient way of collecting it. Under the Notification imposing tax it is provided that the tax shall not be levied in respect of such period during which water, owing to shortage of supply or any other cause, has not been available This shows that the tax is payment for water received and not a tax on property The answer to the third question is therefore in the negative

12 With these remarks the reference is returned.

Reference Answered,

BEFORE MR D N NORMAN, I C. S

Sheo Prasad etc Defendants—Appellants

Versus

Mst Dakhan Plaintiff—Respondent.

Civil Second Appeal No 14 of 1938 decided on 28th November 1938 against the decree, dated 13th December 1937 passed by the Additional District Judge Ajmer in Civil Appeal No 34 of 1937

(a) Evidence Act (I of 1872)—S. 103—Deposit—Burden on the person asserting; Limitation Act (1908) Art. 60

The burden of proving any particular transaction to be a deposit lies on the person asserting it. *[Para 7]*

(b) Limitation Act (V of 1908)—Article 60—Deposit and agreement or relationship of banker and customer must be proved—If a trader acts as a banker strict proof necessary—Initiative of transaction no test

It must be proved that there was a deposit and that there was an agreement that the money should be payable on demand or alternatively

that the relationship of the parties was that of customer and banker A trader may act as banker to particular customers, strict proof of this must be offered *15* P *709*, *15 L 242*, and *17 L 481* **Distinguished**

[P*ara 9*]

Initiative for the original transaction does not prove either the loan or the deposit in a contract of loan the offer may come from the lender

[P*ara 11*]

Limitation Act (V of 1908)—Article 60—"Agreement"—Implied when relationship established.

When a relationship of customer and banker is established such agreement is implied

[P*ara 12*]

Mr. Ghisu Lal—For Appellants

Mr Raghu Nath Agrawal—For Respondent

Judgment.—This is a defendant's appeal arising out of a suit to recover with interest money deposited with the defendant's firm The plaint which was filed on 21-10-1933 stated that a sum of Rs 632/- had been deposited with the defendant firm on 28-10-28 and that a demand for it had been made on 22-9-1933 Defendants by their written statement denied any deposit on 28-10-1928 but admitted the receipt of Rs 1,000/- from plaintiff in 1921 and that the balance of this due to plaintiff on 28-10-1928 was Rs 632/- They alleged that this sum had afterwards been repaid and also pleaded limitation

2 No attempt was made to amend the plaint Plaintiff in her evidence while admitting that transactions between her and the defendant firm began in 1921 said that Sheo Prasad, defendant No 1, came to her on 28-10-1928 to repay the amount due, but that she asked him to retain the principal and keep the interest

3 The trial Judge disbelieved this evidence He held that the original transaction was a deposit within the meaning of Article 60, and that time therefore ran from the date of demand. But as he found that the first demand made was

more than 3 years before the date of suit he held that the suit was out of time He also remarked that plaintiff could be non suited because she had failed to prove her original cause of action namely the deposit on 28-10 1928 For some unexplained reason no issue on repayment was framed nor was any evidence led on this point.

4 On appeal by plaintiff the learned Additional District Judge took a different view He also disbelieved the evidence of a deposit on 28 10 1928 but held that this was not fatal to the suit as it was not disputed that Rs 632/ was due to plaintiff at that date He agreed that Article 60 applied but disagreed with the trial Court's finding that there had been demands prior to 21 9 1933 He therefore allowed the appeal and decreed the suit.

5 In second appeal two points are taken The first is that plaintiff having failed to prove the cause of action pleaded namely a deposit on 28 10 1928 must be non suited the second is that the suit fell under Article 57 or 59 and not Article 60 On both points I find for the appellants

6 Had no question of limitation been involved I should have agreed with the Additional District Judge that plaintiff though she failed to prove a deposit on 28 10 1928, could succeed on defendants admission that the money was due to her on the date defendant having failed to prove repayment. But to save limitation plaintiff had to prove not merely that the money was due on that date but that it was money on deposit within the meaning of Article 60 Having alleged and failed to prove a deposit on 28 10 1928 plaintiff is not entitled to a finding that the original transaction of 1921 which would of course determine the character of the balance due in 1928 was a deposit. For on that point there was no issue and had there been an issue defendants might have led evidence to show the nature of the original transaction On this point alone therefore I agree with the trial Court that plaintiff must fail

7. Further I do not think there was evidence on which the Court could find that the suit fell under Article 60. Article 60 is as follows:—

> "For money deposited under an agreement that it shall be payable on demand, including money of a customer in the hands of his banker so payable"

and time runs from the date of the demand The exact difference between it and Article 59 (suit for money lent) is not obvious Macleod C J in *Govind Chintaman Bhat* v. *Kachubhai Gulab Chand*[1] even said that the difference between a loan and a deposit could not be exactly defined. It was however held in that case that a deposit is a species of loan, a view which finds confirmation in the remark of Lord Atkin in *Mohammad Akbar Khan* v *Attar Singh and others*[2] that loan and deposit are not mutually exclusive terms. It was further held in *Govind Chintaman Bhat* v. *Kachubhai Gulab Chand*[1] that the burden of proving any particular transaction to be a deposit lies on the person asserting it—a view which I have no hesitation in accepting

8 The trial Judge held that the transaction was a deposit because Sheo Prasad in his evidence said that about a year after the first transaction plaintiff asked him to transfer part of the money to another person and keep the balance deposited in plaintiff's name, and because the word "jama" is used in Sheo Prasad's account relating to the original transaction He held that the money was payable on demand from the course of dealings between the parties and because the money was the money deposited with a banker The Additional District Judge who dealt on the point very cursorily held that Article 60 applied because the money was in the nature of deposit by a customer with his banker, and because the money originally came into Sheo Prasad's hand on plaintiff's initiative

(1) 19 Bombay Law Reporter 503. (2) I L R 17 Lahore 557

9 For Article 60 to apply it must be proved that there was a deposit and that there was an agreement that the money should be payable on demand, or alternatively that the relationship of the parties was that of customer and banker, this being a particular kind of deposit payable on demand Now it was never asserted in the plaint that the plaintiff and defendants were customers and banker Defendants are in fact traders and though a trader may act as banker to particular customers, strict proof of this must be offered. But neither Court has considered whether such proof exists. It appears that between 1921 and 1928 one further payment by hundi was made by plaintiffs and that about twice a year she was permitted to withdraw money I do not think that this by itself established a relationship of customer and banker It follows that the cases relied on by the Courts below in particular *Balabux Marwari v Inder Kumar Tewari*[3] *Gulab Rai Gujar Mal v Sandhi Rattan Chand and others*[4] and *Kanti Chandra Mukerji Official Receiver Versus Badri Das (Plaintiff) Wadho Ram Budh Singh and others*[5] are irrelevant since in them it was held that such relationship did exist

10 As against Sheo Prasad's statement that plaintiff asked that the money should remain as a deposit there is plaintiff's statement that the original transaction was one of loan I very much doubt however if either word was used with any appreciation of the legal distinction between them Later in his evidence Sheo Prasad terms the transaction a loan Moreover it would be especially unsafe to rely on Sheo Prasad s use of the word deposit as an admission since as pointed out earlier the legal character of the original transaction had never been put in issue Nor do I think the use of the word 'jama is conclusive If plaintiff relied on this she should have cross examined Sheo Prasad on its use

(3) I L R. 15 Patna 709 (4) I L R 15 Lahore 242.
(5) I L R 17 Lahore 481

11. The Additional District Judge has remarked that the initiative in the original transaction came from plaintiff This by itself does not prove a deposit. in a contract of loan the offer may sometimes come from the lender Really no evidence has been led to show the circumstances of the original transaction The hundis were sent to defendants by a third person with instructions to credit them in plaintiff's name (vide Exh D 1) But plaintiff has not stated why this was done, nor is there any cross-examination of Sheo Prasad to elicit why he accepted the hundis

12 Thus I do not think there was any evidence on which the courts below could in law find that the original transaction was one of deposit Further, there is no evidence whatever of any agreement that the money should be repayable on demand When a relationship of customer and banker is established such agreement is no doubt implied, but as I have shown, such relationship is not here proved

13 Finally Mr Raghunath, for respondent, has suggested that Article 120 might apply Clearly it does not Deposit being a species of loan if Article 60 does not apply then either Article 57 or Article 59 will

14 The appeal must therefore be allowed I set aside the decree of the lower appellate Court and restore that of the trial Court Appellants must get the costs of this appeal from respondent

Appeal accepted.

BEFORE MR D R NORMAN, I C S

Narain Das Plaintiff—Applicant.

Versus

Shiv Charan etc Defendants—Respondents

Misc. Civil Second Appeal No 23 of 1938 decided on 1st December 1938 against the decree passed by Additional District Judge Ajmer on 21st March 1938 in Civil Appeal No 59 of 1936

Hindu Law—Partition—Property mortgaged with possession need not be joined

A suit for partition need not include property mortgaged with possession. [*Para 4*]

Mr Kaushal Das Deedwania—For Appellant.

Messrs Daya Shanker Bhargava Debi Dayal Bhargava and *Shri Krishna Agrawal*—For Respondents.

Judgment—This is an appeal against a judgment of the Special Additional District Judge remanding a suit for trial under Order 41 Rule 23

2 The facts are that the appellant filed a suit for partition of joint property including a shop at *Diggi* The shop was at the time mortgaged with possession and defendants asked that the mortgagees should be made parties The Court held that they should and ordered plaintiff to add them Plaintiff however instead of doing this struck the Diggi shop out of the property of which partition was sought The Defendants then objected that the suit not being for partition of all the joint property, did not lie and a preliminary issue was framed on this point. It was decided against the plaintiff and the suit was dismissed Plaintiff appealed The Special Additional District Judge held that, as the shop was not in possession of the parties to the suit, it was not necessary to include it in the property to be partitioned, and that plaintiff's suit was not bad He then remarked, In my opinion it

would be more equitable to allow the plaintiff appellant to amend his plaint so as to include the Diggi shop and to make the possessors of Diggi shop as parties" The judgment nowhere sets aside the Court's decree or remands the case for trial on the remaining issues As however it provides for a refund of court fee I presume that the absence of any operative order is an over-sight and that the Judge did intend to remand the suit

3 The ground of the appeal is that Plaintiff should not have been ordered to amend his plaint and that he should have been allowed his costs in the lower appellate Court Respondents 1 to 5 and 7 to 8 have filed cross-objections on the ground that the decree dismissing the suit should have been maintained

4 As the cross-objections go to the root of the matter, I will deal with them first. The Special Additional District Judge has cited authorities for the proposition that property not in possession of the parties need not be included in a suit for partition, and in some of them property mortgaged with possession has been held to be property not in possession No authority to the contrary has been cited Mr Daya Shanker for respondents argues that it would be inequitable to exclude the Diggi shop since that shop was mortgaged by the father of the plaintiff alone and he alone took the consideration This point appears to be a new one It is not referred to in the judgments of either of the Courts below Further, it is not supported by the evidence The mortgage deed has not been put in Plaintiff in cross-examination stated that the house was mortgaged by his father But it is not a certain inference from this that his father was the sole mortgagor There is no evidence at all about who got the mortgage money I therefore see no reason for not following the rule in *Kristayya* v *Narasimham*[1] and other cases that a suit for partition need

(1) I L R 23 Madras 608

not include property mortgaged with possession The cross objections therefore fail and are dismissed with costs

5 The appeal however must succeed Although on the face of his judgment the Judge merely expresses an opinion that the mortgagees should be joined, that opinion has been incorporated in the decree, and the trial Judge might take it as a direction As such it is clearly wrong If as the Special Additional District Judge holds and as I also hold the suit will lie without including the Diggi shop, then there can be no ground for compelling the plaintiff to include that shop in the property to be partitioned and still less for compelling him to join the mortgagees and thus introduce into the suit all sorts of questions as regards the mortgages which are outside the scope of a partition suit

6 I also think that the appellant should have been given his costs in the lower appellate Court. The Special Additional District Judge has disallowed them 'in the special circumstances of this case He does not indicate what special circumstances he means, and Mr Dava Shanker has not been able to point out to any which would in my view justify the Special Additional District Judge s order

7 The appeal succeeds I modify the order of the lower appellate Court by deleting the direction to the plaintiff to include the Diggi shop and make its possessors parties I also allow the appellant his costs in that Court from respondents 1 to 8 Appellant will get his costs in this Court from respondents 1 to 8

Appeal Allowed

BEFORE MR D R NORMAN, I C S.

Mohammed Yusuf Plaintiff—Appellant

Versus

Azim Ullah . Defendant—Respondent

Civil Second Appeal No. 32 of 1938, decided on 6th December 1938, arising out of the decree passed by the Additional District Judge, Ajmer, on 29th June 1938, in Appeal No. 79 of 1937

Civil Precedure Code (V of 1908)—Schedule II, Para 15—Award cannot be set aside in part

Court cannot set aside an award in part only The whole award has to be set aside.

[*Para 3*]

Mr. Moti Lal Malaviyar—For the Appellant

Mr Abdul Rashid—For the Respondent

Judgment:—Plaintiff filed a suit for partnership accounts which was referred to arbitration, The arbitrator dismissed the suit on the ground that for three partnership transactions the plaintiff had produced no evidence and that as regards the fourth, relating to grass at Sethana, the defendant's evidence was more reliable than the plaintiff's On the return of the award it was pointed out to the Judge that the three transactions about which plaintiff had led no evidence had never been disputed by the defendant The Judge holding that the arbitrator had committed a patent error of law on the face of the award amounting to misconduct set aside the award under paragraph 15 of Schedule 2, superseded the arbitration and heard the suit himself In result he took a different view from the arbitrator about the Sethana transaction and granted plaintiff a preliminary decree for accounts as regards all the four transactions. The defendant appealed and the Additional District Judge framed two issues —

(1) Whether the learned Sub-Judge had no jurisdiction to set aside the entire award ?

(2) Whether the learned Sub-Judge erred in holding that the Sethana grass had been purchased in partnership?

2 On the first point he held that the Sethana transaction being a distinct one the Judge was not justified in setting aside the award as regards that transaction The second point he found unnecessary to decide though he remarked "I am however inclined to think that the view taken by the learned Sub Judge is more reasonable and proper' In result he modified the trial Court's degree by allowing accounts of the other three transactions only

3 Plaintiff has come in second appeal and I think must succeed. I am inclined to agree with the Additional District Judge that the award was separable into parts But as I read paragraph 15 of the second schedule it does not provide for the Court setting aside an award in part only The fact that the consequence of setting aside the award is an order superseding the arbitration is a strong indication that the whole award must be set aside Mr Abdul Rashid states that he can quote no authority to the contrary Nor have I been able to find one This aspect of the case does not appear to have been argued before the Additional District Judge

4 Mr Abdul Rashid however contends that the trial Court should not have acted under Para 15 but should have modified the award under Para 12 (A), since the only point referred to arbitration was the Sethana transaction Now the order of reference unfortunately does not set out the matters in difference, and the application for it only says that the arbitrator should be appointed to decide the matters in dispute A reference to the pleadings shows that there were other matters in dispute beside the Sethana transaction For instance the defendant contended that the partnership had already been dissolved, that the defendant was not liable to render accounts and the suit must be for a fixed sum of

money. It may be that these points were not pressed before the arbitrator, but there is no doubt that points other than the Sethana transaction were referred to him. It was therefore not possible for Trial Judge to modify the award under Para 12

5 The last question is what] order I should pass. Mr Moti Lal asks that the decree of the Trial Court should be restored relying on the remark of the Additional District Judge which I have quoted The Additional District Judge however having first stated that it was not necessary to record a finding on point No. (2), I am not able to accept this remark as a finding of fact binding on this Court.

6 I allow the appeal, set aside the decree of the Lower Appellate Court and remand the case to that Court for disposal on the remaining issue. Costs of this appeal will be costs in the case

Case remanded.

BEFORE MR. D R NORMAN, I. C. S.

Amar Chand Defendant-Applicant

Versus

Bhola Nath Plaintiff-Opposite Party.

Misc Civil Revision No 50 of 1938, decided on 29th November 1938, against the orders, dated 14th March, 1938, passed by the Sub-judge, Ajmer, in Civil suit No 28 of 1937.

Civil Procedure Code (V of 1908)—S 151—Case may be re opened before judgment is pronounced.

A case may be reopened at the discretion of the Judge at any time before judgment is pronounced if good grounds are shown

[*Para 4.*]

Civil Procedure Code (V of 1908)—S 115—Interference—When no grounds or manifestly unfair result

In matters of judicial discretion this Court will not interfere unless there are either no grounds whatever for its exercise or unless its exercise produces a manifestly unfair result

[*Para 4*]

Practice—Procedure—Party should be given opportunity to consult his counsel before making decision

If plaintiff has a legal adviser present in the Court he ought to be given an opportunity to consult him before being asked to make any decision.

[*Para 4*]

Mr Raghu Nath Agrawal—For the Applicant

Mr Ghisu Lal—For the Opposite Party

Judgment—These two revision applications though arising out of different suits may be dealt with in a single judgment. Opponent filed two suits Nos. 285 and 287 of 1937 on two bonds against applicant. The suits were not consolidated but were put down for hearing on the same day Further the main issues in both were the same, namely whether the bond used was bad for want of consideration and fraud and whether the suit was in time by reason of a payment of interest The burden of proving the first issue lay, of course, on the defendant and of proving the second issue on the plaintiff Both suits were fixed for the defendant's evidence on 25 1 1938 But on that date for some reason which is not apparent, the plaintiff was asked to begin He refused to do so His counsel Mr Govind Pershad was in Court and according to the Judge's note, said that the plaintiff had not seen him that morning and that he wanted to point out to the plaintiff the consequences of his not giving evidence It appears however that the Judge instead of letting counsel advise the plaintiff himself explained to the plaintiff that his suit might be dismissed. The plaintiff however remained obstinate and as the defendant also did not wish to lead evidence both suits were adjourned for judgment.

2 On 28th January, before judgment was pronounced, plaintiff put in an application under Section 151 C P C. He made various allegations such as that the defendant had by fraud prevented him from consulting his counsel and that he was upset by the death of a friend, and asked permission to lead evidence. This application purports to be made in both suits and was so treated by the Judge, Mr Jawahir Lal, as appears from the fact that judgment in both suits was deferred It was however actually filed among the papers of Civil Suit No 285 Notice of it was ordered to issue but before the application could be heard Mr Jawahir Lal was transferred and was succeeded by Mr Abdul Salam Mr. Salam allowed the application and set down both suits for plaintiff's evidence It is against this order that the present applications have been preferred In each it is urged that the order reopening the case was either made without jurisdiction or was an irregular exercise of jurisdiction, and in Civil Revision Application No 53 it is further urged that the order in Civil Suit No 287 is entirely void since in that suit no application to reopen the case was made at all

3 Taking the latter point first, I think the two cases must be treated on the same footing Mr Raghu Nath stated that he did not take this point when the application was heard on 14th March, but it is clear that up to that date both parties as well as the Judge understood the application to deal with both suits. This is clear from the fact that the Judge did not pronounce judgment in either suit on the day fixed, namely 31st January, and because there is no entry in the Roznama of either suit until 14th March when it is recorded in both Roznamas that the application under section 151 C P C. had been disposed of. Further it would not be possible for me to allow one application and reject the other, since, as I have stated, there is nothing to show why the application under section 151 C. P. C. was filed in the papers of suit No. 285 rather than in the papers of suit No. 287. Of course there

ought to have been two separate applications, but as the trial Judge failed to notice this I can take no action beyond ordering a second court fee to be paid

4 I am unable to agree that the Judge had no jurisdiction to reopen the case A case may be reopened at the discretion of the Judge at any time before judgment is pronounced if good grounds are shown Further, in matters of judicial discretion this Court will not interfere unless there are either no grounds whatever for its exercise or unless its exercise produces manifestly unfair result. Here the Judge has given two grounds for the exercise of his discretion The first is that on 25th January, Mr Jawahir Lal acted under a misapprehension in asking the plaintiff to begin when that date was fixed for defendant's evidence The second is that parties should not be punished for their mistakes As regards the first, it is true that the Judge should have either asked the defendant to begin, or if he changed his mind and wished the plaintiff to begin should have asked him whether he wished for an adjournment. It does not appear that it was because the plaintiff had not his evidence ready that he refused to begin But Mr Ghisu Lal argues that had the Judge allowed plaintiff's counsel to advise him instead of putting questions to the plaintiff himself the plaintiff might have realised his position For this argument I think there is a good deal to be said. If plaintiff has a legal adviser present in the Court he ought to be given an opportunity to consult him before being asked to make any decision It is quite probable that Mr Govind Pershad would have been much more effective than the Judge in pointing out to plaintiff the inevitable result of his obstinacy Without therefore considering the Judge's second ground I find that there were some grounds on which a discretion could be exercised in favour of the plaintiff Therefore, although I, acting as an original Court might have exercised my discretion differently, I do not propose to interfere except to award the defendant costs in the trial Court When one party is shown

an indulgence the opposite party should always be compensated by costs

5. I modify the trial Court's order by directing that the defendant be given one day's special costs in the trial Court in each suit The amount will be fixed by the trial Court I further direct that an additional court fee stamp of Re. 1/- be affixed by plaintiff on his appliction under Section 151 C P. C. Subject to this the applications are rejected but without costs

Order Modified.

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BEFORE MR D R NORMAN, I.C S

Gopi, Mst. .. ... Decree Holder-Applicant.

Versus

Ratan Lal, Seth . . Judgement Debtor-Opposite party.

Small Cause Court Revision No 78 of 1938, decided on 30th November 1938, arising out of the decree, dated 30th April 1938, passed by the Judge, Small Causes Court, Beawar, in S C C Suit No. 19 of 1938

Civil Procedure Code (V of 1908)—S 47 and O. 21, R. 2—Compromise to pay decree by instalments—Instalments in arrears—Suit filed—Held Executory contract is not adjustment, hence decree subsists and suit does not lie

Compromise to pay decree by instalments. Decree amended accordingly Instalments fell in arrears Suit on compromise, *Held*, Executory Contract was not adjustment Hence decree subsisted and the suit was berred by S. 47 C. P C [*Para 2*]

Mr Hem Chandra Sogani—For Applicant.

Mr Nathu Lal Ghiya—For Opponent

Order —Applicant obtained a decree against Opponent in the Court of the Sub-Judge, Ajmer, on 3-5-1921 and got it transferred for execution to the Sub-Judge, Beawar. While

execution was proceeding the parties arrived at a compromise by which the decree was to be paid off by instalments and asked the Judge to amend the decree The Judge allowed the amendment The second instalment falling into arrears, applicant then took out execution in the Beawar Court. Opponent contended that the order amending the decree was incompetent The Judge agreed with this and dismissed the application Applicant then brought a suit on the compromise The suit was dismissed on the ground that the compromise was not an adjustment within the meaning of Order 21, Rule 2, that it therefore did not extinguish the original decree and that plaintiff's suit was barred by section 47 C P C Applicant has now come in revision

2 Although the point is not free from difficulty the Trial Court was in my view right Both sides have referred to a large number of decided cases, but none exactly covers the point raised here Had the compromise amounted to an adjustment which might have been certified under Order 21, Rule 2, then I have no doubt that applicant could have sued on the compromise But it was held in *Kalyan Mal* v *Ram Pal*[1], a case on which the Trial Court relied, that an executory contract is not an adjustment within the meaning of Order 21, Rule 2 and cannot be pleaded as a bar in execution Mr Hem Chandra for applicant has not attempted to distinguish the compromise in this case from the compromise which this Court considered in *Kalyan Mal* v *Ram Pal*[1], Now a compromise which is not an adjustment within the meaning of Order 21, Rule 2 clearly does not extinguish the original decree since the original decree can be executed inspite of it. It follows that such a compromise is not a contract enforceable at law For if the original decree is not extinguished there is no consideration proceeding from the decree holder It will be found in all the cases on which Mr Hem Chandra relies that the compromise extinguished the original decree

1. 1936 A. M. L. J. 159

3 To take any other view would be manifestly unjust For the decree holder would then have the choice of two remedies to execute his original decree, and to sue on the compromise Mr Hemchandra suggests that if he took out execution after the compromise the judgement debtor could sue for damages But, in the view I take he could not The cause of action in a suit for damages is some wrongful act on the part of the decree-holder and to execute a decree which is still in being is not a wrongful act

4. The application must therefore be rejected but in the special circumstances I make no order for costs

Application Rejected.

BEFORE MR D R NORMAN, I C S

Ladhu Ram .... Plaintiff-Applicant.

Versus

Ladu Defendant-Opposite Party.

Small Cause Court Revision No. 84 of 1938, decided on 2nd December 1938, arising out of the decree, dated 12th July 1938 passed by the Judge, S C C, Ajmer, in Suit No 434 of 1937.

Limitation Act (1908)—S 20.—Part payment need not be actual cash—Test laid down.

Part payment need not be in actual cash and the test is whether the payment would be an answer to a suit brought by the creditor to recover the amount, *29 M 234. Foll*

[*Para 2*]

Mr Debi Dayal Bhargava—For the Applicant

Mr Shiam Swarup Mathur—For the Opposite Party.

Order.—Applicant filed a suit against Ladu and Gopi, father and son, on a khata executed by Ladu alone. Sometime after the execution of the khata Gopi did some work for the applicant and, at the request, or at any rate with the consent,

BEFORE MR. D. R. NORMAN, I.C.S.

Suraj Mal . .. Judgment-debtor-Applicant

Versus

Kailash . . Decree-holder-Opposite party.

Small Cause Court Revision No. 118 of 1937, decided on 21st November 1938, against the Order, dated 1st November 1937, passed by the Judge, Small Cause Court, Ajmer, in Execution Case No 1801 of1936

Civil Procedure Code (V of 1908)—S 47—Moveable property attached—Then released—Question of return of property must be decided in Execution proceedings:

Decree Holder attached a motor-car belonging to the Judgment-debtor. The attachment was released but the Judgment-debtor had difficulty in the return of the car *Held*, The matter of the return of the car is patently a question relating to the execution of opponent's decree arising between opponent and his judgment debtor and is therefore to be determined by the Court executing the decree and not by a separate suit *Further*, the Court having attached the car is bound to give the applicant every aid in recovering the car when the attachment had been removed

[*Para 2*],

Mr *Chand Karan Sarda*—For the Applicant

Mr *Bishamber Nath Bhargava*—For the Opposite party

Order.—One Sua Lal attached Applicant's motor car in execution of a decree against him The car was handed over to Sua Lal for custody and was kept in the garage of one Doctor Garg Thereafter Opponent who also held a decree against the Applicant filed a Darkhast and applied for rateable distribution Sua Lal however came to terms with the Applicant and the car was released from attachment Opponent then applied for attachment of the car and the car was nominally attached and handed over to him on his giving an amanatnama to the Nazir Actually the car never left Dr Garg's garage Before the car could be sold, Opponent and Applicant came to terms and put in a joint compromise

under which opponent's decree was to be paid by instalments This was on 5th April 1935 Whether the Judge took this to be an application under Order 20, Rule 11 and whether he failed to consider under what rule it fell is not clear Any how the order he passed was that the decree should be amended in terms of the compromise and the car should be released from attachment After this the applicant applied to the Nazir several times for the return of his car but without result Finally when further proceedings for execution were taken against him by the opponent he asked the Court for the return of his car The Judge after holding some enquiry passed a brief order saying that the car was still with Dr Garg to whom garage rent was due, that the applicant ought to have taken possession of the car at once after the compromise with Opponent, and that if he had any grievance he could file a suit

2 This order is obviously not sustainable The matter of the return of the car is patently a question relating to the execution of opponent's decree arising between opponent and his judgment debtor the applicant and is therefore to be determined by the Court executing the decree and not by a separate suit Further the Court having attached the car is bound to give the applicant every aid in recovering the car when the attachment had been removed.

3 It appears to me that the proceedings have been irregular from the start The relevant rule on the attachment of movable property is Order 21, Rule 43 and under it the attaching officer "shall keep the property in his own custody or in the custody of one of his subordinates and shall be responsible for the due custody thereof ' The procedure therefore followed in this case (and I am told it is very frequent ly followed) of entrusting the attached property to the decree holder on his executing an amanatnama has no warrant in law That however does not relieve the Court from its duty to assist the applicant.

4. For the Opponent Mr Bishember Nath states that the car is with Dr Garg and that he is ready to return it if he is paid the rent due to Dr Garg As the car is in his possession it is obvious that he has to return it But I am unable to agree that he has any claim to get fromh is judgment-debtor the rent due to Dr Garg. When he took possession of the cai he made no stipulation about rent and the amanatnama is an unconditional undertaking to return the car Mr. Bishembher Nath argues that the applicant is in default for not demanding the car earlier I am unable to agree. The opponent was aware that the attachment had been removed and was bound either to return the car to the applicant or to the Nazir after paying such rent as might be due for storing it

5 I therefore set aside the order of the Trial Judge and make the following order The Opponent must return the attached car to applicant in the same condition in which it was handed ovei to him, subject to such deterioration as would naturally occur owing to the lapse of time, if the car were properly housed Opponent must pay applicant's cost in this application

Order set aside.

BEFORE MR D R. NORMAN, I C S

Johri Lal .... Decree Holder-Applicant

Versus

Aziman, Mst Judgment Debtor-Opposite party

Small Cause Court Revision, No 56 of 1938, decided on 5th December 1938, against the order, dated 8th February 1938, passed by the Judge, Small Cause Court, Ajmer, in Suit No 1890 of 1921.

Civil Procedure Code (V of 1908)—S 48 & S 152—Application for amendment—Must be made before it becomes barred by limitation

Although there is no limitation for an application to amend a decree under Section 152 C P C., such application must be made before the decree has become unexecutable owing to the 12 years limitation provided by S 48

[*Para 2*]

Mr *Brij Narain Bhathur*—For the Applicant

Mr *Abdul Rashid*—For the Opposite Party

Order—In the year 1921 applicant filed a suit against opponent and obtained judgment for a sum of money payable by instalments In the decree drawn up thereon however there was no reference to instalments Prior to 1928 three darkhasts for a current instalment were filed Then in 1928 although according to the terms of the judgment the whole amount was not recoverable applicant applied to execute the whole decree Similar applications were made in 1931 and 1935 Applicant next filed an application for amending the decree to bring it in accordance with the judgment which was filed apparently for want of prosecution Finally applicant presented a second application for amendment which was dismissed on the grounds (1) that a decree the execution of which has become time barred cannot be amended so as to bring execution within time (2) that the applicant having endeavoured to execute the decree for the whole amount cannot now be heard to say that it should really have been an instalment decree

2 I have not been able to trace any authority on the two points raised But I have no doubt that the trial Judge decided them rightly Although there is no limitation for an application to amend a decree under Section 152 C P C., I think it obvious that such application must be made before the decree has become un executable owing to the 12 years limitation provided by Section 48 I further think that having attempted to take advantage of the fact that the decree

was not correctly framed it is not open to applicant to ask for an amendment when he thinks that a decree in accordance with the judgment would better suit his purpose.

3. The application is rejected with costs

Revision dismissed.

BEFORE MR D R NORMAN, I C S

Kanhaiya Lal . Defendant-Applicant.

Versus

Chunni Lal Plaintiff-Opposite-Party

Small Cause Court Revision No. 9 of 1938, decided on 30th November 1938, against the decree, dated 21st October 1937, passed by the Judge, S. C. C., Nasirabad, in Suit No 288 of 1933

Interest—When accounts are made up parties can contract that interest will run on whole sum—But not so as to avoid Damdupat ; Ajmer Law's Regulation S. 33

The rule of Damdupat cannot be avoided by an agreement that interest shall be treated as principal But subject to that there is nothing to prevent parties contracting when the accounts are made up that interest shall run on the whole sum then due and not on the original principal

[*Para 2*]

Mr *Bridhi Chand Lakhotia*—For the Applicant.

Mr *Ram Chandra Arun*—For himself

Order.—The first point taken in this application is that applicant, Kanhaiya Lal, was not a party to the khata baqi of 21-10-1930 and so the suit is not in time Although Kanhaiya Lal did not sign the khata baqi himself the plaint alleges that it was executed on his behalf, and from a perusal of the three written statements which Kanhaiya Lal put in I am satisfied that his liability under the khata baqi is implicitly admitted. This point therefore fails,

2 The second point taken is that interest should have been calculated on the original sum Rs 800/ and not on the amount due for principal and interest at the time of khata baqi, namely Rs 905/ I am referred to a decision of this Court *Ram Chandra* v. *Radha Kishen*[1] in which it was held that mere accounting could not turn interest into principal In that decision however the question was what was the principal for purposes of damdupat. The rule of damdupat cannot he avoided by an agreement that interest shall be treated as principal But subject to that there is nothing to prevent parties contracting when the accounts are made up that interest shall run on the whole sum then due and not on the original principal That is what happened here.

3 The third point taken is that the applicant is not liable for the increased rate of interest, since Exh P 1 which provides for it is not signed by him The Trial Judge held that Kesri Lal being a partner of Kanhaiya Lal, Kesri Lal s signature bound Kanhaiya Lal That however is not the case made out in the plaint as finally amended in which it is stated that Exh P 1 was executed by both Kesri Lal and Kanhaiya Lal I do not think Kanhaiya Lal can be made liable on a case which was never pleaded and I therefore allow this point. The actual difference comes to Rs 22/

4 I modify the decree of the trial Court by substituting Rs 88/ for Rs 110/ Further, plaintiff will get proportionate costs only in the trial Court In this Court applicant having failed on the greater part of his claim must pay half the costs of opponent.

Decree modified

1 1934 A M. L. J 70.

BEFORE MR D. R. NORMAN, I C S.

Gulab Kanwar, Shrimati .. Applicant

Versus

Udai Chand, Seth and *others* .... Opposite-party

Civil Revision No 21 of 1938, decided on 6th December 1938, against the decree, dated 17th January 1938, passed by the Sub-judge, First Class, Beawar, in Civil Suit No 27 of 1933

Civil Procedure Code (V of 1908)—Order 32, Rules 3, 4 & 11—If guardian is removed plantiff should be asked to suggest another—Nazir should be appointed as last resort.

If the guardian ad litem is to be removed, plaintiff should be asked to suggest another person Nazir should be appointed as a last resort

[*Para 4*]

Mr. Jyoti Swarup Gupta—For Applicant

Mr Ghasu Lal—For Opposite-party *

Order.—Seth Udai Chand, present opponent No 1, filed a suit on a mortgage executed in his favour by defendants 1, 2 and 5 on behalf of themselves and their minor sons defendants 3 and 4 Defendants 6 and 7 were said to be after born sons. Defendant No 3, Nemi Chand, was appointed guardian of defendant No 7, Mangal Chand All the evidence was concluded by March 1935, but the final disposal of the suit was delayed by a successful applicatiou by defendant No 5 to get ex parte proceedings against him set aside On 27th March 1936, which was date fixed for defendant No 5's written statement, Nemi Chand, was absent The Judge, Mr Qureshi, made an ex parte order against him and removed him from the guardianship of Mangal Chand, and 4 days later, without any application by the plantiff, appointed the Nazir as guardian. On 8th December 1937 Mangal Chand's mother, Gulab Kanwar, applied to be made guardian of Mangal Chand

*Opposite parties Nos 3, 4 and 5 absent inspite of notice

on the ground that neither Nemi Chand nor the Nazir had been a proper guardian The Judge, who was then Rai Sahib Jagat Nandan, held that Nemi Chand was the proper person to be guardian and that he had not been negligent The Judge further held that Nemi Chand had been improperly superseded and that Mr Qureshi had passed this order without applying his mind to it. His order concluded as follows:—

> Considering all the circumstances of the case, I think the orders regarding removal of Nemi Chand from the guardian ship of Mangal Chand and appointment of Court Nazir as guardian ad litem should be ignored and for all intents and purposes Nemi Chand should still be considered as the guardian ad litem of the minor Mangal Chand The result is that I dismiss the petition

Gulab Kanwar has come in revision against this order

2 The first remark is that both the Judge and the parties have confused two separate questions, namely (1) whether Gulab Kanwar should be appointed guardian of Mangal Chand and (2) whether having been so appointed she should be allowed to reopen past proceedings Strictly speaking the second question does not arise until the first has been decided But to save further disputes I propose with the consent of counsel on both sides to determine both questions On the first point I see no reason for disregarding Gulab Kanwar's request The trial Court s order in this respect cannot be supported, since not only has Nemi Chand been reappointed without his consent, but as I am told the ex parte order passed against Nemi Chand has never been set aside. Mr Ghisu Lal for opponent No 1 has no objection to the appointment of Gulab Kanwar

3 On the second point I agree with the trial Judge that Nemi Chand was the proper person to be Mangal Chand s guardian There is no defence open to Mangal Chand which is not equally open to Nemi Chand Mr Jyoti Swarup states

that he has one additional defence to make, namely, that the debt to pay off which the mortgage was incurred was due to speculation That defence however was equally open to Nemi Chand Nemi Chand engaged counsel and appears to have neglected neither his own nor the minor's interest in the conduct of the suit His non-appearance on the date on which he was removed is doubtless due to the fact that neither he nor Mangal Chand had any interest in what was to be done at the hearing Until the removal of Nemi Chand therefore the minor Mangal Chand was properly represented

4 I also agree with the trial Judge that both the removal of Nemi Chand and the appointment of the Nazir was improper. The Nazir should only be appointed as a last resort, and if Nemi Chand was to be removed plaintiff should have been asked to suggest another person As however Mangal Chand has not been adversely affected by anything done since that date there is no ground for allowing proceedings to be re-opened

5 I set aside the order of the trial Judge and appoint Gulab Kanwar guardian of the minor Mangal Chand Permission to file a fresh written statement or to re-open any of the past proceedings in the suit is refused Parties will bear their own costs in this application

Order set aside.

BEFORE MR D R. NORMAN, I C S

ChouthMal etc Applicant.

Versus

Uda .. Opposite Party

Small Cause Court Revision No 64 of 1938 decided on 23rd November 1938 against the decree passed by the Judge, S C. C Beawar on 24th February 1938, in Suit No 475 of 1937

Evidence Act (1 of 1872)—S. 73—Judge's comparision of signatures—Not entitled to weight.

A Judge is not an expert in hand writing and although the law allows him to compare a disputed signature with an admitted signature, he ought not to attach too much weight to such comparison.

[*Para 2*]

Mr Debi Dayal Bhargava—For Applicant.

Mr Kanhaiya Lal Verma—For Opponent.

Order—Applicant's grievance is that the trial Judge disbelieved his evidence about the execution of the suit khata on inadequate grounds including a comparison of the signature of the defendant with his signature on the summons

2 I have pointed out before that a Judge is not an expert in hand writing and, although the law allows him to compare a disputed signature withlan admitted signature, he ought not to attach much weight to such comparison Moreover in this case the signature on the summons had not been admitted by the defendant.

3 The oral evidence was otherwise disbelieved on one rather petty contradiction The opinion of the Judge who heard the evidence is however entitled to considerable weight. Further, there is this difficulty that although the evidence is that the khata was executed for actual cash, the account entry is ambiguous as it states at the end "struck khata baqi"

Further, the alleged repayment on which plaintiff relies to save limitation and for which there is only the evidence of the plaintiff, appears from the account entry to have been a mere book transfer and not a cash payment

4 In these circumstances I do not think there is sufficient ground for interfering in revision The application is rejected with costs

Revision dismissed.

BEFORE MR D R NORMAN I.C S.

Sohan Lal Applicant—Accused

Versus

Crown Opposite party

Criminal Application No 55 of 1938, decided on 17th November 1938.

Criminal Procedure Code (V of 1898)—S. 498—Written objection of prosecutor not adequate—Prima facie evidence must be produced when bail opposed on ground of tampering of evidence

The Judge should of course, give notice to the prosecution, though in special cases ad interim bail may be granted But the prosecutor should appear at the hearing of the application, and the Judge should not refuse bail merely on his written report Further, when he opposes bail on the ground that the witnesses are being or are likely to be tampered with, he should produce some prima facie evidence in support of his allegation

[*Para 3*].

Criminal Procedure Code (V of 1898)—S. 498—Case of Criminal Breach of Trust—Bail not to be refused merely because offence is punishable with transportation.

In a case under section 409 I P C. (Criminal Breach of Trust by a public servant) a Sessions Judge should not refuse bail solely on the ground tha the maximum punishment is transportation for life, but should take into consideration the amount misappropriated. [*Para 4*]

Mr Chand Karan Sarda—For the Accused.
K B Abdul Wahid Khan—For Crown.

Order —This is an application for bail

2 Applicants Nos 1 to 3 are members and applicant No 4 is the Secretary of the Shamlat Committee of Pushkar, and they are being prosecuted under Section 409 I P C for breach of trust in their capacity of public servants That offence is punishable with transportation for life and the Magistrate rightly refused bail Applicants then moved the learned Additional Sessions Judge who sent the application to the Prosecuting Inspector for report. The Prosecuting Inspector returned it with an endorsement that the applicants were overawing the prosecution witnesses, and on the strength of this endorsement the learned Additional Sessions Judge refused bail The applicants then moved this Court and obtained ad interim bail

3 The procedure of the learned Additional Sessions Judge was not correct Before granting bail under Section 498 Cr P C the Sessions Judge, should of course, give notice to the prosecution, though in special cases ad interim bail may be granted But the prosecutor should appear at the hearing of the application and the Judge should not refuse bail merely on his written report. Further, when he opposes bail on the ground that the witnesses are being or are likely to be tampered with, he should produce some prima facie evidence in support of his allegation

4 In the present case I am not inclined to refuse bail merely on the ground that the offence charged is punishable with transportation for life. Section 409 Cr P C, may cover a breach of trust in respect of any amount from one rupee to one lac of rupees and therefore to treat all cases coming under it as on the same footing for purposes of bail is not a sound sense In the present case the amount in respect of which a breach is alleged only Rs. 75/

5 As regards the overawing of the witnesses the learned Public Prosecutor concedes that he has no evidence, and a condition has been made in the ad interim bail that the applicants should not stay in Pushkar

6 I allow the application and order that the ad interim bail be continued If any attempt should be made in future to tamper with the witnesses it is open to the prosecution to move this Court to cancel the bail

Application allowed

BEFORE MR D R. NORMAN, I. C S

Shamsher Beg, M... Applicant

Versus

Nazir Begum . Opposite party.

Criminal Reference No. 29 of 1938, decided on 14th November 1938, made by the Additional Sessions Judge, Ajmer, by his Order, dated 17th June 1938, arising out of the order, dated 28th October 1937, passed by the Honorary Magistrate, First Class, Section "D", Ajmer, in Cr Case No. 4 of 1937

Criminal Procedure Code (V of 1898)—S. 488—Wife apprehends ill treatment on return—Husband asks wife to return—He not absolved.

There had been no refusal to maintain since there had been no demand *Held*, the husband's action in asking his wife to return does not acquit him of neglect if his wife has genuine grounds for believing that she would be ill-treated if she should return Apprehension of ill-treatment, if well founded, is a sufficient reason for the wife's refusal to live with her husband

[*Para 3*]

Mr Shamshul Ghani Khan—For the Applicant

Mr Swarup Narain Agarwal—For Opposite party

Order.—This is a reference from the learned Additional Sessions Judge in a maintenance matter.

2 The facts are that the applicant left her husband some five years ago and lived with her own father Her husband frequently requested her to return but she refused to do so on the ground that she had been ill treated She filed an application for maintenance which the learned Bench Magistrates allowed The ground of this reference, as stated by the learned Additional Sessions Judge, is that maintenance can be granted only when there is neglect or refusal to maintain, that the trial Court did not discuss the question of refusal and that its finding about neglect is based on surmises and sentiment

3 It is true that in this case there has been no refusal to maintain since there has been no demand I am however unable to agree with the learned Additional Sessions Judge's view that the husband s action in asking his wife to return acquits him of neglect even though his wife may have genuine grounds for believing that she would be ill treated if she should return Neglect to maintain a wife means omission to maintain her when a duty to maintain exists. A husband however has ordinarily a right to his wife s society and so has no duty to maintain her if without sufficient reason she refuses to live with him But apprehension of ill treatment, if well founded, has always been held to be sufficient reason Therefore before making this reference the learned Additional Sessions Judge should have determined whether the wife s apprehensions are well founded that is to say whether her allegations of previous cruelty were proved

4 The learned Additional Sessions Judge has remarked, quite truly, that the Bench Magistrates judgment on this point is not satisfactory since it contains no critical examination of the evidence and does not state which witnesses the Bench believed Evidence was however led to show that the wife was beaten by the husband and was on one occasion branded, and as the Bench found these allegations proved, it may be

assumed that they considered prosecution evidence better than the defence Therefore even though the judgment does not state why they took this view, I do not propose to interfere in revision.

5 Let the record be returned to the learned Additional Sessions Judge.

Order Confirmed.

BEFORE MR. D R NORMAN, I C S.

Kanhaiya Lal Complainant—Applicant

Versus

Amra and *others* . Accused—Opposite party

Criminal Reference No 46 of 1938, decided on 14th November 1938, made by the Additional Sessions Judge, Ajmer, by his order, dated 8th August 1938, arising out of the order, dated 13th July 1938, passed by the Chairman, Bench C, of the Honorary Magistrates, Ajmer

Criminal Procedure Code (V of 1908)—S. 204—Case transferred to another Magistrate—Latter can decide what offence the complaint discloses.

The Cr P C nowhere prescribes the registration of a case under a particular section, although of course the Magistrate will have to consider under what section the offence disclosed falls in order to decide whether to issue a summons or warrant and whether to try the case as a summon case or warrant case 'The Magistrate taking congnizance" is the Magistrate to whom the case has been transferred, and who is actually trying it

Mr Moti Lal Malayvar—For the Applicant

Mr Lekh Ram Angrish—For Opposite party

K. B Abdul Wahid Khan—For Crown

Order.—This is a reference from the learned Additional Sessions Judge.

2 Applicant made a complaint to the City Magistrate charging three persons with removing stones from a platform in front of his house and with uttering threats when he remonstrated with them The learned Magistrate after examining the complainant ordered the case to be registered under Sections 352 and 379 I P C and transferred it to the Bench Magistrates under Section 192 Cr P C The learned Magistrates however held that the complainant s statement did not disclose a case under Section 379 I P C and ordered the case to be registered under Section 352 I P C, summons to issue and process fee to be paid Applicant moved the learned Additional Sessions Judge in revision on the ground that as the City Magistrate had registered the case under Section 379 I P C, it was not for the Bench Magistrates to register it under another section The learned Additional Sessions Judge accepting this view has referred the case to this Court

3 I do not agree with the learned Additional Sessions Judge The Cr P C nowhere prescribes the registration of a case under a particular section, although of course the Magistrate will have to consider under what section the offence disclosed falls in order to decide whether to issue a summons or warrant and whether to try the case as a summons case or warrant case The relevant section on this point is section 204 Cr P C under which the decision rests with the "Magistrate taking congnizance" In my view "the Magistrate taking congnizance' is the Magistrate to whom the case has been transferred and who is actually trying it. It was there fore open to the Bench Magistrates to treat the case as falling under Section 352 I P C if that was the only offence which the complaint, read with the examination of the complainant, disclosed

4 On the merits however I think that the Bench Magistrates' order was wrong Complainant in his examination

states that the stones were being removed by the accused, and that, assuming that the stones belonged to the complainant, is theft If the Magistrates were doubtful of the truth of the complaint it was open to them to order an enquiry under Section 202 Cr P C before issuing process But it was not open to them to reject altogether to charge under Section 379 I. P C.

5 I therefore set aside the order of the Bench Magistrates and direct them either to proceed as upon a complaint of an offence under Section 379 I P. C or, if they think fit, to direct an enquiry under section 202 Cr. P. C.

Order set aside.

BEFORE MR. D R NORMAN, I. C S

Bano, Mst Applicant—Accused

Versus

Rahim Bano, Mst Opposite party—Complainant

Criminal Revision No. 53 of 1938, decided on 19th November 1938, arising out of the order, dated 11th October 1938, passed by the Additional Sessions Judge, Ajmer, in Criminal Revision No 72 of 1938

Criminal Procedure Code (V of 1908)—SS. 200, 202, 203& 204—Complaints against pardah-nashin women—Duty of Magistrates to examine record and result of enquiry before issuing process, Criminal Trial (Duty of Magistrate)

Unfortunately a criminal prosecution, which has little chance of ultimate success, is frequently used as a means of annoyance especially against women who like the Applicant are pardah-nashin It is the Duty of Magistrates to protect the public against such abuses of the criminal procedure,

[*Para 2*],

If upon reading the complaint and examining the complainant the Magistrate thinks that a prima facie case is shown he may order process to issue at once If he is doubtful he may order an enquiry He is, of course, not bound by the opinion of the person holding an enquiry But he should take that opinion and the statements of the witnesses examined at the enquiry into consideration he should no neglect these entirely and order the case to be continued on the ground that the accused has not proved his innocence.

[*Para 3*]

Mr Abdul Qadir Beg—For Applicant

Mr Parmatma Swarup—For Opponent.

K B Abdul Wahid Khan—For Crown.

Order—A complaint of criminal breach of trust was made against Applicant and her husband The Magistrate ordered a police enquiry under section 202 Cr P C and the police reported that there was a prima facie case against the husband but not against the applicant. The Magistrate after considering the report ordered the case to be continued against both accused remarking as regards Applicant there is nothing before me to absolve Mst Bano from the liability

2 The attitude of the Magistrate was obviously wrong It does not rest on an accused to prove his innocence Unfortunately a criminal prosecution which has little chance of ultimate success is frequently used as a means of annoyance especially against women who like the Applicant are pardah nashin It is the duty of Magistrates to protect the public against such abuses of the criminal procedure and this duty was pointed out by Weston J C in a decision published only a few days before the Magistrate s order in the present case (See 1938 A M L J 111)

3 If upon reading the complaint and examining the complainant the Magistrate thinks that a prima facie case is shown, he may order process to issue at once. If he is doubtful he may order an enquiry He is, of course, not bound by the

opinion of the person holding an enquiry But he should take that opinion and the statements of the witnesses examined at the enquiry into consideration he should not neglect these entirely and order the case to be continued on the ground that the accused has not proved his innocence

4 On looking into the papers of the enquiry I can find no clear statement of an entrustment to the applicant

5 I allow the application, set aside the order of the learned Magistrate and direct that as against the Applicant the complaint may be dismissed.

Application allowed.

BEFORE MR D R NORMAN, I C. S

Man Mal Accused—Applicants

Versus

Ram Prasad Complainant—Opposite party.

Criminal Reference No 43 of 1938, decided on 17th November 1938, made by the Additional Sessions Judge, Ajmer, by his order dated 28th July 1938, in Cr. Revision No 40 of 1938, against the order dated 19th April, 1938, passed by the Additional District Magistrate, Ajmer, in Criminal Appeals Nos 52, 53, 54 and 55 of 1938.

Penal Code (XLV of 1960) —S 447.—Colourable title not sufficient—Dispossessing one in peaceful possession for substancial time amounts to offence

It is not enough that the trespasser should have some colourable title Any one who has been in peaceful possession of land for a substantial time has the right to retain that possession irrespective of his legal title, until dispossessed by the process of law If someone else has or thinks he has a better title to the property he must get possession by legal process If he takes possession by force with the object of forcing the existing possessor to go to law then he is guilty of Criminal Trespass, *2 A M L J 20 Ref*

[Paras 2 & 3].

Mr Ghasu Lal—For Applicant.
Mr Ram Chandra Arun—For Opponent.
K B Abdul Wahid Khan—For Crown.

Order —This is a reference from the learned Additional Sessions Judge Four persons were convicted by the Second Class Magistrate, Ajmer, of criminal trespass and sentenced each to pay a fine of Rs. 30 The conviction of one of them, Man Mal, was affirmed by the Additional District Magistrate on appeal The ground of the reference is that Man Mal entered the land under a bona fide claim of right which has been held by Baker J C in *Kesri Mal* versus *Crown through Kaloo Ram*[1] to be the test in a prosecution for criminal trespass

2 The difficulty in a criminal trespass case is to decide whether the trespasser is really acting bona fide. I do not think it enough that the trespasser should have some colourable title In the case referred to, the trespasser was a purchaser from a co sharer and therefore presumably had a right to sue for possession But inasmuch as his vendee had been for a long time out of possession he was held not to be acting bona fide Anyone who has been in peaceful possession of land for a substantial time has the right to retain that possession irrespective of his legal title, until dispossessed by the process of law If someone else has or thinks he has better title to the property he must get possession by legal process If he takes possession by force with the object of forcing the existing possessor to go to law then he is in my judgment guilty of criminal trespass For it is quite certain that the person whose peaceful possession is invaded will be annoyed and the ordinary legal presumption is that a man is presumed to intend the natural consequence of his acts.

3 I am aware that there are authorities which take a contrary view and hold that the legal presumption to which I have referred does not hold good in a case of criminal trespass

1. 2 A. M. L. J 20

From that view however Baker J C expressly dissented in 2 A, M L. J 20, and with due respect it seems to me a direct encouragement to the stronger party in a civil dispute to take forcible possession and get that advantage which possession always confers on the litigant Moreover if a person in peaceful possession is given no protection under the criminal law against disturbance he is likely to meet force by force

4 Now in the present case it is argued by Mr Ghisu Lal for Man Mal that both parties were trying to get possession of the land which was in possession of tenants and that the applicant had obtained possession for one day only by turning out previous tenants who were attorning to Man Mal and putting in his own tenant The argument however is contrary to the facts as found by the Courts below In their view complainant had been in peaceful possession for more than a year through tenants who only attorned to Man Mal when complainant refused to renew their tenancy and Man Mal had never at any time had possession These are findings of fact which ought not to be questioned in revision

5 I therefore see no reason to interfere. Let the record be returned to the Additional Sessions Judge

Order confirmed

BEFORE MR D R NORMAN, I C S.

Gopi and *others* . Accused—Applicants

Versus

Crown through *Chander* Complainant—Opposite party.

Criminal Reference No 32 of 1938, decided on 17th November 1938, made by the Additional Sessions Judge, by his order, dated

30th June 1938 in Cr Revision No 30 of 7938, against the order dated 17th February 1938, passed by the Honorary Magistrate, First Class, Bench A Ajmer in Case No 21 of 1937

(a) Criminal Procedure Code (V of 1898)—S 367—Judgement should give reasons for decision

Judgment must contain reasons for decision.

[*Para* 2]

(b) Criminal Procedure Code (V of 1898)—S. 435—Court may go into facts

The rule that a revisional Court should not go into facts is not an absolute one

[*Para* 5]

(c) Criminal procedure Code (V of 1898)—S 438—Reference when conviction unsustainable

No reference to the High Court should be made merely on the ground that the Magistrate's judgment is not a legal one In such case the Sessions Judge should himself examine the record, and should refer only if he considers that injustice has been done

[*Para* 5]

Mr *Raghu Nath Agarwal*—For Applicant.

K B *Abdul Wahid Khan*—For the Crown.

Order —This is a reference from the learned Additional Sessions Judge in a case in which three persons were convicted by Bench A of the Honorary Magistrates of causing simple hurt and were sentenced each to pay a fine of Rs 10/ The ground of the reference is that the judgment of the learned Chairman does not comply with the requirements of section 367 Cr P C and the Additional Sessions Judge recommends that the case be returned to the Bench for disposal after writing a proper judgment according to law

2 The trial Court's judgment certainly reflects no credit on the Magistrate who wrote it Its failure to set out the points for determination is not material as there was only one

point for determination namely whether the accused caused hurt to complainant, But no reason whatever is given for the Court's finding The judgment merely states that the Court believes the prosecution witnesses and disbelieves the defence witnesses. Further, three accused are convicted and one aquitted without any reason being given for the distinction

3 Now I am aware that a Magistrate may find it easier to decide which of two sets of witnesses is speaking the truth than to record his reasons for his decision in a judgment especially when he has to write such judgment in a foreign language But so long as the law requires a judgment in a particular form the Magistrate must endeavour to comply with it and no person who is unable to write a legal judgment ought to be invested with magisterial powers, still less with first class powers.

4. The recommendation of the learned Additional Sessions Judge however is neither legal, nor likely to produce a just result, The powers which an Appellate and therefore a revisional Court may exercise, are defined in section 423 (1) (b). Nor is it likely that a Magistrate who was unable to state his reasons for believing one set and disbelieving another set of witnesses immediately after hearing the witnesses would be able to state these reasons correctly some 9 months later

5 The Additional Sessions Judge's failure to examine the record and come to his own conclusion on the facts is also incorrect The rule that a revisional Court should not go into facts is not an absolute one No reference ought to be made to this Court unless the Additional Sessions Judge is satisfied that there has been an injustice, and the mere fact that the Magistrate has not written a legal judgment does not show that his finding is wrong If the Additional Sessions Judge after examining the record and giving due weight to the view of the Bench was satisfied that there were good grounds for

conviction he should have rejected the application, only if he thought the conviction unsustainable should he have made a reference to this Court It is certainly regrettable that the Sessions Court should have to spend time on a petty case owing to Magisterial incompetence, but the alternative remedy, a retrial would be worse

6 On the merits I think the correctness of the conviction doubtful The applicant says that the prosecution witnesses who give evidence of the assault arrived after accused had run away and other persons whom he says were present were not examined There are also several contradictions in the prose cution evidence

7 I accept the reference, set aside the convictions and acquit the accused The fine, if paid, should be refunded.

Reference Accepted

THE
AJMER-MERWARA,
LAW JOURNAL.

1939.

January 1, 1939 to December 31, 1939 | SECTION II—NOTIFICATIONS | *Every Section has a separate paging*

1 Public Holidays during 1939.

Notification No. 723/217—A 37 issued by the Chief Commissioner, Ajmer-Merwara—published in the Gazette of India, Part II—A for November 12, 1938 at p 656

It is hereby notified that all courts, offices and educational institutions under the Chief Commissioner, Ajmer Merwara, will be closed on the days named in the list below which will be observed as public holidays in the year 1939 —

Classification of Holidays	Name of Holidays	Dates	Days of the week	Number of days
All Creeds .	New Year's Day	2nd January	Monday	1
Mohammedan	Id-ul Zulia	1st February	Wednesday	1
Hindu	Shiv Ratri .	17th February	Friday	1
Mohammedan	Moharrum	28th February, 1st and 2nd March	Tuesday to Thursday	3
Hindu	Holi	5th & 6th March	Sunday & Monday	2
Do	Sil Saptmi	13th March	Monday	1
Christian	Good Friday	7th April	Friday	1
Do	Easter Monday	10th April	Monday	1
Mohammedan	Barawafat .	3rd May	Wednesday	1
Hindu	Baisakhi	3rd May	Wednesday	1
All Creeds	Empire day .. .	24th May	Wednesday .	1
Do	King s Birthday	8th June .	Thursday	1
Mohammedan	Urs Khawaja Saheb	21st and 22nd August	Monday & Tuesday	2
Hindu	Rakshabandan	29th August .	Tuesday .	1
Do	Janam Ashtami	6th September	Wednesday	1
Do	Jhaljhulani Ekadasi	24th September	Sunday	1
Do	Anant Chaturdashi	27th September	Wednesday	1
Mohammedan	Shab i-Barat	28th September	Thursday	1
Hindu	Dasehra	20th to 22nd October	Friday to Sunday	3
Do	Dipmalika	10th and 11th November	Friday to Saturday	2
Do	Yam Duitya	13th November	Monday	1
Mohammedan	Id ul Fitr	13th November	Monday	1
Hindu	Pushkar Fair .	22nd to 27th November	Wednesday to Monday	6
Christian	Christmas	24th to 31st December	Sunday to Sunday	8

NOTES—1 The last Saturday in each month may be observed as a holiday at the discretion of the Heads of Offices

2 The Treasury Office Ajmer shall be closed on the last day of each month (excluding March) for the purpose of transactions.

3 Mohammedan holidays depend on the moon being visible and fall on the day following such event

4 Holidays may be granted in Ajmer Merwara on the occasion of local festivals and fairs at the discretion of the Commissioner Ajmer Merwara.

5 The Civil Court vacations shall consist of 4 days in the months of May and June and the actual dates shall be fixed and notified by the Judicial Commissioner Ajmer Merwara. During this period the Courts of the Judge Small Causes and Sub-Judges will be entirely closed and those of the District Judge and Munsifs, Sub-Judges and Judges, Small Causes, discharging executive or criminal work in addition to their civil functions will remain closed for civil work only

6 The Last Friday of Ramzan and Friday the 18th August will be observed as holiday for Mohammedans.

7 There will be one Lunar Eclipse during the year *viz* on Wednesday the 3rd May 1939 and holiday will be observed on Thursday the 4th May 1939

8 With the previous approval of the Superintendent of Education Delhi Ajmer-Merwara and Central India, seven days during the whole year will be allowed to each Government educational institution for the observance of special and local holidays.

9 The Madrsa Islamia High School Ajmer will observe such holidays during the year as may be decided by the Convener of the School provided that the total number of holidays does not exceed the maximum number of holidays viz 105 allowed to the other local educational institutions of the same status.

2. Civil Court Vacations During 1939

Notification No 123 36 J/VIII 38 dated February 4 1939 issued by the Judicial Commissioner Ajmer Merwara

Under the provisions of Notification No 723/217 A/37 dated 3rd November 1938 issued by the Hon'ble the Chief Commissioner Ajmer Merwara it is hereby notified for general information that the civil court vacations during the current year will be observed from 16th May to 2 June 1939 both days inclusive

3 Pleaders fees in Civil Courts

Notification No 88—J/VII—38 dated January 18 1939 issued by the Judicial Commissioner Ajmer Merwara—published in the Gazette of India for January 28 1939 Part II A at p 88

In exercise of the powers conferred by Section 130 of the Civil Procedure Code (V of 1908) and in supersession of all existing circulars and orders the Judicial Commissioner Ajmer Merwara with the previous sanction of the Provincial Government is pleased to make the following Rules regulating the scale of pleaders fees in respect of all proceedings in the Civil Courts of Ajmer Merwara, other than the Court of the Judicial Commissioner Ajmer Merwara.

These Rules shall come into operation from 1st February 1939 and the scale shall be as under —

1 In suits, or in appeals from decrees in suits for money, effects or other personal property, or for land or other immovable property of any description, when such suits or appeals are decided on the merits after contest —

(1) if the amount or value of the claim shall not exceed Rs 5,000, 5 per cent

(2) if the amount or value shall exceed Rs 5,000 and shall not exceed Rs 20,000, on Rs 5,000 as above, and on the remainder 2 per cent,

(3) if the amount or value shall exceed Rs 20,000 and shall not exceed Rs 50,000, on Rs 20,000 as above, and on the remainder 1 per cent,

(4) if the amount or value shall exceed Rs 50,000 and shall not exceed Rs 80,000, on Rs 50,000 as above, and on the remainder ½ per cent,

(5) if the amount of value shall exceed Rs 80,000, on Rs 80,000 as above, and on the remainder at ¼ per cent subject to a maximum of Rs 3,000

Provided that in a reference to a Civil Court under the Land Acquisition Act No 1 of 1894, the scale of fees shall be one half of that allowed in a contested suit, calculated on the amount in dispute *i e*, on the difference between the amount allowed by the Collector, and amount claimed by the applicant

Provided further that in suits for money, effects or other personal property, the minimum fee to be allowed on taxation shall be Rs 2 and in other suits Rs 5

2 (a) When such suits or appeals are decided *ex parte* or on confession of judgment or are compromised, withdrawn or dismissed for default, or when an appeal is rejected under order XLI, rule 10 of Act No V of 1908, and

(b) in applications under Schedule II, paragraph 17 and paragraph 20 of Act No V of 1908—

half the fee prescribed by Rule 1 provided that the maximum fee shall not exceed Rs 500.

Provided further that in suits or appeals, compromised or withdrawn, a Court may, having regard to the stage at which the compromise or the petition of withdrawal is filed, award a full fee as prescribed in rule 1 *supra*,

Provided further that in an uncontested reference to a civil Court under the Land Acquisition Act No 1 of 1894 the scale of fee shall be one half of that allowed in a contested reference

3 In Miscellaneous Judicial cases, including objections filed by judgment debtors or third parties in proceedings instituted in execution of original or appellate decrees, appeals from orders and in other cases—

one fourth the fee prescribed by Rule 1 provided that the maximum fee shall not exceed Rs. 250

4 In an inquiry as to pauperism under orders XXXIII and XLIV of Act No V of 1908 the fee payable to a Government Pleader who has opposed an application for leave to sue as a pauper or has applied for the dispaupering of the plaintiff shall be ten per centum on the amount of the court fee that would be payable on the plaint if the suit were not brought by a person alleging pauperism provided that no fee in excess of Rs. 75 shall be payable under this rule

A Government Pleader who sues out execution of decree without having appeared in Court in the proceedings prior to decree is entitled to the fee prescribed in the first part of this rule

5 In these Rules the amount or value of the claim means the value for purposes of jurisdiction as set forth in the plaint application or memorandum of appeal

6 All pleaders fees shall be calculated to the nearest rupee

7 Notwithstanding the provisions of rules 1 to 4 a Court may in any case, for special reason to be recorded in the judgment, award a higher or a lower fee than that therein prescribed or may disallow a fee altogether

8 In cases in which the subject matter of the claim does not admit of valuation, the Court shall fix a reasonable fee regard being had to the time occupied in the decision of the case and the nature of the questions raised therein

9 If several defendants who have a joint or common interest succeed upon a joint defence or upon separate defences substantially the same, not more than one fee shall be allowed unless the Court shall otherwise order for a reason which shall be recorded in the judgment. If only one fee be allowed the Court shall direct to which of the defendants it shall be paid or shall apportion it among the several defendants in such manner as the Court shall think fit.

10 If several defendants, who have separate interests, set up separate and distinct defences and succeed thereon, a fee for one legal practitioner for each of the defendants who shall appear by a separate legal practitioner may

be allowed in respect of his separate interest Such fee, if allowed, shall be calculated with reference to the value of the separate interest of such defendant in the manner hereinbefore prescribed

11 For each fee allowed under the two last preceding rules the value of the stamp on one vakalatnama only shall be awarded as costs

12 Except where an adjournment is made with the consent of all parties, or where from insufficiency of notice a party has not had reasonable time to prepare himself for trial, an adjournment should ordinarily not be granted, save on the condition that the party applying pay all the costs of the day, including a reasonable fee to the legal practitioner engaged by his adversary

4 Criminal Jurisdiction

Statement, issued by the District Magistrate, vide endorsement No B—5596-5635-iv-c-1, dated 31st December 1938, showing the Criminal Jurisdiction of the various Courts in Ajmer-Merwara

Serial No	*Name of Court*	*Powers*	*Area within which the Court will exercise powers*
1	Naib Tahsildar, Beawar	III Class	Todgarh, Jawaja Police Circles
2	Do I, Ajmer	II Class	Gegal, Pisangan and Manghawas Police Circles
3	Do II, Ajmer	III Class	Nasirabad, Srinagar Police Circles excluding Nasirabad Cantonment
4	Tahsildar, Beawar	II Class	(1) Beawar and Masuda Police Circles excluding Beawar Municipal limits (2) Todgarh and Jawaja Police Circles when Naib Tahsildar has only III Class powers
5	Do Ajmer	Do	(1) Pushkar Police Circle (2) Srinagar and Nasirabad Police Circles excluding Nasirabad Cantonment when Naib Tahsildar II has only III Class powers
6	City Magistrate, Ajmer	I Class	Ajmer Municipal limits and Srinagar Police Circle
*6-A	Do	Do	Cases under the Cantonment Act arising out in Nasirabad Cantonment
7	Honorary Magistrate Kekri	II Class	As allotted by the Hon'ble the Chief Commissioner, Ajmer-Merwara in the appointment order

Serial No	Name of Court	Powers	Area within which the Court will exercise
8	Do Beawar	Do	Beawar Municipal limits.
9	Section A of the Bench of Honorary Magistrates Ajmer B C D	Chairman of each Bench has 1st Class powers without him the Magistrate exercises II Class powers.	The jurisdiction of these Courts is allotted by the District Magistrate annually when appointments of Honorary Magistrates are made
10	Honorary Magistrate Municipal Side Ajmer	II Class.	Do
11	Do Police Side Ajmer		
12	Tahsildar Kekri ..	II Class	Kekri sub-division excluding Kekri Municipal limits.
13	Registrar Co-operative Societies Ajmer	II Class	*Such cases as are transferred to him.*
14	Assistant Commissioner and Magistrate 1st Class Nasirabad.	I Class.	Nasirabad Cantonment limits except Cantonment cases.
15	Section A/B of the Bench of Honorary Magistrates Nasirabad	II Class	Nasirabad Cantonment limits
16	Sub Divisional Officer Kekri	I Class (Sub Divisional Magistrate)	Kekri sub-division
17	Income Tax Officer Ajmer ..	I Class.	Gegal Police Circle.
18	Superintendent of Excise Ajmer	Do.	Such cases as are transferred to him
19	Treasury Officer Ajmer ..	Do.	Mangliawas Pisagan and Pushkar Police Circles.
20	Railway Magistrate Ajmer	Do	Railway limits.
1	Special Honorary Magistrates Ajmer to try cases under Prevention of Cruelty to Animal Act	Do	As allotted by the Hon'ble the Chief Commissioner Ajmer Merwara in the appointment order
21	Do Nasirabad ...	Do.	
22 A	Do. Beawar ...	Do.	
23	Extra Assistant Commissioner Merwara.	Do (Sub Divisional Magistrate)	Beawar sub-division
24	Assistant Commissioner Ajmer Merwara.	(a) Sub Divisional Magistrate (b) Additional District Magistrate	(a) Ajmer sub-division. (b) Ajmer Merwara.
25	General Manager Court of Wards Ajmer	I Class.	Nasirabad Police Circle (excluding Nasirabad Cantonment) and estates under the management of the Court of Wards.
26	District Magistrate, Ajmer Merwara	District Magistrate.	Ajmer-Merwara.
27	Additional Sessions Judge	Sessions Judge.	Do
28	Sessions Judge	Do.	Do.
29	Judicial Commissioner	High Court	Do.

Note—The Honorary Magistrates in the rural areas of Beawar Kekri and Ajmer Sub-divisions have not been included as the jurisdiction is allotted by the Hon'ble the Chief Commissioner in his orders of appointment.

Entries No 6-A and 22 A have been added by No B—1534-44-IV-c 1 dated the 15th Feb. 1939 issued by the District Magistrate Ajmer-Merwara (Ed.—A.M L.J.)

Civil Jurisdiction—Schedule (*continued*)

Serial No.	Name of Court.	Powers.	Area of jurisdiction.	No and date of Chief Commissioner's Notification	1st appeal heard by	2nd appeal heard by	Remarks
8	Judge Small Cause Court Ajmer	(1) Judge Small Cause Court	(1) Ajmer Sub-division excluding Nasirabad Cantonment	No 738 C/217 A/38 dated the 14 39	No appeal	Revision to No 18	
		(2) Sub Judge 1st Class	(2) All special jurisdiction civil suits the valuation of which for jurisdiction purposes is above Rs. 10 000/ and not exceeding Rs 50 000 arising in the Ajmer Sub-division excluding Nasirabad Cantonment.	No 737-C/217 A/38 dated the 14-2 39	No 18		
9	Sub Judge Ajmer	Sub Judge 1st Class.	Ajmer Sub-division excluding Nasirabad Cantonment and Bagsuri Estate		(1) To No 15 if the amount or value of the subject matter is less than five thousand rupees. (2) To No 18 if the amount or value of the subject matter is five thousand rupees or upwards	(1) No 18	
10	Additional Sub Judge Ajmer	Do	The allocation of work between these two Sub-Judges will be made by the Judge, Small Cause Court Ajmer				
11	Sub Judge Ajmer	(1) Judge Small Cause Court (2) Sub Judge First Class.	(1) Kekri sub-division (2) (i) Kekri sub-division	No 738-C/217 A/38 dated the 14-2 39	(1) No appeal (2) (i) No 15 if the amount or value of the subject matter is less than five thousand rupees.	(1) Revision to No. 18 (2) (i) No 15.	

Civil Jurisdiction—Schedule (continued)

Serial No	Name of Court.	Powers.	Area of jurisdiction	[illegible]	[illegible]	[illegible]	[illegible]
14	Railway Magistrate Ajmer	Sub Judge 1st Class	Within Railway limits.	...	(1) No. 15 [illegible] thousand rupees. (2) No. 15 [illegible] thousand rupees.	[illegible]	
15	Additional District Judge Ajmer	(1) District Judge	Ajmer-Merwara				
16	2nd Additional District Judge Ajmer	(2) District Courts for Insolvency work	Such cases as may be transferred to him by No 15		No. 15	—	
17	District Judge Ajmer Merwara.	District Judge	Ajmer-Merwara.		No 15		
18	Judicial Commissioner Ajmer Merwara.	High Court	Do				

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THE
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LAW JOURNAL.

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CONTAINING

Cases determined by the Court of Judicial Commissioner, Ajmer-Merwara and important Notifications applicable to Ajmer Merwara.

Editor:

JYOTI SWARUP GUPTA,
Advocate, High Court,
AJMER

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1939-Part II

Alphabetical Index of Cases Reported

A M L J Committee.

1 Mr Jawand Lal Datt Chowdhry
2 Mr Dharmendra Vir Shivahare
3 Mr. Jyoti Swarup Gupta *(Convener)*

The Ajmer-Merwara Law Journal.
1939-Part II.

SUBJECT INDEX.

Civil Procedure Code (V of 1908) Contd

—O 20 R 11 (2)—If executing Court passes order it acts without jurisdiction —The order is a nullity—Acquiescence of oo avail 104

—S 38 and O 21 R. 11 (2)—If executing Court passes order it acts without jurisdiction —The order is a nullity—Acquiescence is of oo avail 104

Contract Act (IX of 1872):

—S 92—Executants of a bond cannot adduce evidence to show that they signed as sureties 84

—S 134—Debtor insolvent—But sued without sanction of Insolvency Court—Remaining defendant even if they were sureties, had not been discharged. 84

—S. 134 and S 137—Suit against principal debtor barred by time—It becomes barred against the surety also 66

Evidence Act (I of 1872)

—S 27—Two witnesses making statements leading to discovery of property—only first statements can be proved—when it is doubtful as to who made the first statement all such statements should be ignored. 56

Court Fees Act:

—S 7 (IV) (a) and Sch II Art 17 (3)—Injunction claimed as consequential relief—Claim is under S 7 (IV)—And a single valuation covers both declaration and injunction 60

—S 7 (X)—Suit for specific performance of a portion comprised in the contract—Court fees on proportionate consideration. 80

—S 17—Claim arising out of a single cause of action, e. g a deed of relinquishment—It is for a single declaration even though the declarations sought are with respect to several plots 80

—S 17—Reliefs in the alternative—Court Fees only on relief with highest valuation 66

—Sch II, Art 17(3) and S. 7 (IV) (a)—Injunction claimed as a consequential relief—S 7 (IV) applies—Single valuation covers both declaration and injunction 60

BEFORE MR. D. R. NORMAN, I. C S.

Gaindi, Mst Plaintiff-Applicant.

Versus

Sheo Pershad and *others* Defendants-Opposite Parties

Small Cause Court Revision No. 61 of 1937, decided on 13th December 1938, against the Judgment and decree, dated 30th March 1937, passed by the Judge, Small Cause Court, Beawar, in S C. C. Suit No. 94 of 1934.

Limitation Act (IX of 1908)—Art 60—Loan or deposit :

When one person places money with another person to secure a regular monthly payment to a third person the transaction amounts to one of deposit, and the person with whom money is deposited becomes, as regards that particular transaction, the banker of the depositor [Para 3.]

Mr. Raghu Nath Agarwal—For the Applicant

Messrs Moti Pershad Mehra and Swarup Narain Agarwal—For the Opposite parties

Order.—These two revision applications, Nos. 60 and 61 of 1937, arise out of two Small Cause Suits, Nos. 93 and 94 of 1934, which were heard along with regular Civil Suit No 8 of 1934 In 1921 Mst Dakhan placed certain money in the hands of a firm of which Sheo Pershad, defendant No 1 in all three suits, was the Manager Thereafter Rs 200/- were transferred to the account of Kali Kamliwala, the Manager of a charity to which Mst Dakhan used to subscribe, with a direction to pay the interest, Re 1/- per month, to the charity Rs 430/- were also transferred from Mst Dakhan's accouut to an account in the name of one Mst Gaindi. Three suits were filed (1) Civil Suit No 8 of 1934 by Mst. Dakhan to recover the balance of her money in the hand of the defendant firm, (2) Civil Suit No 93 of 1934 by Mst Dakhan to recover the amount deposited to secure payment to Kali Kamliwala and (3) Civil Suit No. 94 of 1934 by

Mst Gaindi to recover the amount transferred to the account bearing her name The first suit was a regular civil suit, the latter two Small Cause suits The first suit came upto this Court in appeal, plaintiff's claim being dismissed as barred by limitation It was argued that the original transaction of 1921 amounted to a deposit and that Article 60 applied, but it was held that this was not proved and that the transaction must be considered to be one of loan Both the Small Cause suits were dismissed on the ground that although Article 60 applied there had been a demand more than 3 years before the date of suit

2 The ground on which these two suits were dismissed by the trial Court cannot be upheld. Defendants never pleaded that there had been a demand more than 3 years before the date of suit, and the trial Judge based his conclusion on a vague remark of the plaintiff in cross examination that she had made a demand once or twice but defendants did not pay Even if it were open to defendants to rely on this remark, which in view of the pleadings it was not it does not show that plaintiff specifically demanded the two particular sums claimed in the two Small Cause suits

3 It is however clear that both these suits must like suit No 9 fail on the bar of limitation unless it can be shown that the money which was originally a loan changed its chararacter when it was trasferred from Mst. Dakhan's khata to names of Kali Kamliwala and Mst Gaindi respectively As regards the money set aside to secure paymeot of Mst. Dakhan s subscription to Kali Kamliwala I think there was a chaoge in character In my view when ooe persoo places money with another person to secure a regular monthly paymeot to a third person the transaction amounts to ooe of deposit aad the persoo with whom the money is deposited becomes, as regards that particular traosactioo, the banker of the depositor Article 60 therefore applies and Mst Dakhan's suit for this amount is in time

4. Coming to Mst. Gaindi's suit I find no evidence to show that the money changed its character There is in fact no evidence at all to show in what circumstances the account entry was made or what was agreed on between Mst. Dakhan and Sheo Pershad at the time There is nothing to show that the money was to be held to the use of Mst. Gaindi and not of Mst Dakhan. Further, the suit would have to be dismissed simply on the pleadings. The plaint states that the money was deposited by Mst. Gaindi with the defendants which admittedly is not a fact, and Mst Gaindi can not succeed on facts which she has not pleaded.

5. The result is that Revision application No 60 of 1937 is allowed. I set aside the decree of the trial Court and award Mst Dakhan a decree for Rs 267/- together with future interest on Rs. 200/- at 6 per cent from the date of suit to payment, and costs in both Courts Revision application No 61 of 1937 is dismissed with costs

Revision No 61 dismissed.
Rivision No. 60 allowed.

BEFORE MR D R. NORMAN, I C. S

Manna Lal . . .. Defendant No 1—Appellant.

Versus.

Mst Manna and *others* .. . Respondents

Civil Appeal No 1 of 1938 (Rly J) decided on 12th January 1939, against the judgment and decree dated 8th February 1938, passed by the District Judge, Mount Abu, in Civil suit No. 3 of 1931

Civil Procedure Code (V of 1908)—S 11 —Attaching creditor claims under debtor

An attaching creditor claims under his debtor and is bound by any decree affecting the estate of his debtor even though he may have obtained an attachment before judgment *25C -179* **Foll** *54 C.-595* **Distinguished.**

Mr Raghu Nath Agarwal.—For the Appellant

Mr Daya Shanker Bhargava—For the Respondents.

Judgment—The facts material to this appeal are as follows In 1930 Mst Manna (present respondent No 1) filed Civil Suit No. 4 of 1930 in the Court of the District Judge, Mount Abu, against one Sharfuddin for a declaration of her title to the property which is the subject matter of the present appeal In 1931 Manna Lal (present appellant) filed a money suit (C S No 3 of 1931) against Sharfuddin in the same Court, and on 11 1 1932 obtained an attachment before judgment of the said property and the appointment of a receiver On 1 11 1932 he obtained a money decree against Sharfuddin On 30-12 1932 Sharfuddin died and his daughter Mst. Kamuran (present respondent No 1) was brought on the record of C S No 4 of 1930 as his legal representative. As Mst. Kamuran made no active defence in that suit Manna Lal applied on 19 3 1933 to be made a party through the receiver This application was rejected. On 17th October 1933 Mst. Manna obtained a decree in C S No 4 of 1930 declaring her title to the property Earlier in the year (1933) she had applied for the removal of Manna Lal's attachment but the final order on this, which rejected her claim, was not passed until 1 8 1934 Mst. Manna then filed the suit out of which this appeal arises in the Court of the District Judge joining Manna Lal, Mst. Kamuran, and the receiver as defendants and praying for a declaration of her title and the removal of the attachment. Manna Lal contended that the title was with Sharfuddin, and the two substantial points for decision were (1) whether the result of C S No 4 of 1930 barred Manna Lal from setting up Sharfuddin's title, and (2) if not with whom was the title The learned District Judge held, though with some hesitation that the decision in C S No 4 of 1930 was not *res judicata* but that on the *merits* the title lay with Mst. Manna He therefore decreed the suit Manna Lal has appealed

2 The points of *res judicata* has again been raised by Mr Daya Shanker for respondent No 1 and as it goes to the root of the case I will deal with it first. In my view the decision in C. S No 4 of 1930 is *res judicata* in the present suit

3 The first point is whether an attaching creditor can be said to claim under his debtor For this point Mr Daya Shanker has cited certain cases, but as they are not regularly reported, and as I do not understand Mr Raghunath (for appellant No 1) seriously to dispute the point I shall not refer to them To me it seems patent that an attaching creditor does so claim and quite absurd to suppose that when A has successfully asserted his claim to property against B such claim can thereafter be disputed by all persons (possibly a numerous class) to whom B may owe money But granting that point Mr. Raghunath argues that appellant's rights to dispute the result of C S No. 4 of 1930 are preserved because the attachment was made prior to the decree in that suit

4 I do not think this argument is valid When there is a devolution of interest during a suit the law provides that the person on whom the interest devolves may apply under Order 22, Rule 10 to be joined as a party Now Manna Lal did make an application but unfortunately he worded it very badly Instead of asking to be joined himself he asked that he might be joined through the official Receiver, and his application stated that on the death of Sharfuddin his property devolved on the official receiver Now in the first place there was no official receiver, but merely a receiver appointed for purposes of Suit No 3 of 1931. Secondly nothing vested in the official receiver by reason of Sharfuddin's death, such rights as he had in the suit property arose from his appointment as receiver when the attachment was made some time before the death of Sharfuddin It is therefore not surprising that the learned Judge who heard the application failed to

realise what Manna Lal really wanted and dismissed it Further, although the order of dismissal was appealable Manna Lal did not appeal Having thus failed to avail himself of the means which the law gave him for protecting his interests it is not in my view open to him to say now that the decision in C S No 4 of 1930 cannot affect his interests

5 On this point Mr Raghunath relies strongly on *Kala Chand Banerjee* v *Jagan Nath Marwari*[1] a Privy Council decision In that case a suit on a mortgage was instituted against one T He died pendente lite and his son A was brought on the record as his legal representative and a mortgage decree was passed against him But before T's death A had been adjudicated insolvent and the whole of his estate had under the Provincial Insolvency Act vested in a receiver It was held that, as A by reason of this vesting had no interest whatever in the equity of redemption, he was not the proper legal representative of T, and that no decree passed against A was binding on the receiver, who was the proper legal representative of T, and without whom the suit could not go on The facts are thus entirely different, since here as I have pointed out, Manna Lal did not acquire any interest by reason of Sharfuddin's death, and though a person on whom an interest devolves pendente lite may apply to be joined, no obligation rests on the plaintiff to join him

6 A more analoguous case in my view is *Moti Lal* v *Karrabuldin*[2] also a Privy Council Case There the same property was sold to A and B respectively in execution of two different decrees against different persons A the prior purchaser, filed a suit for declaration of title against that judgment debtor whose interest was eventually sold to B The sale to B took place during the pendency of this suit. It was held that the decision of this suit which was in favour of A was binding on B although he was no party to it Now

1 I L R. 54 Calcutta 595. 2 I L R. 23 Calcutta 177

if the purchaser at a Court auction sale taking place pendente lite is bound by the result of that suit I think it follows a fortiori than an attaching creditor who has a much smaller interest must also be bound

7 Mr Raghunath then argues that C S No 4 of 1930 was collusive There is no evidence of this Collusion is a positive act which cannot be inferred merely from failure to put up a defence, especially when a defence would have been mainly if not entirely for the benefit of a creditor The learned District Judge has discussed this point fully and I have nothing further to add to his remarks

8. Lastly Mr. Raghunath argues that the District Judge's decision on the application under Order 22, Rule 10 was that Manna Lal's right in the property would not be affected by the result of C S No 4 of 1930, and that decision even if incorrect is binding on Mst Manna The District Judge however did not decide that, he only held that the receiver had no personal interest in the suit and that a decree could not be given against him. He did not consider Manna Lal's interest Further, a decision dismissing an application could not anyhow be *res judicata* against any one but the applicant

9 The learned District Judge thought that the matter was not *res judicata* because Mst Kamuran did not fight the case after Sharfuddin's death But, as the District Judge himself observed, a decision does not cease to be *res judicata* because it is made ex-parte The possibility that a defendant, whose interest in property devolves on another pendente lite, may not fight the suit property to the disadvantage of that other was foreseen by the framers of the Civil Procedure Code, and a remedy was provided, namely an application under Order 22, Rule 10 If no such application is made or is made in such a way that it fails then the applicant is as much bound by the result of the suit as if he had been made a party.

10 In view of my finding on the first point it is not necessary to deal with the second.

11 I confirm the decree of the trial Court and dismiss the appeal Appellant will pay the cost of respondent No 1 Respondent No 3 (the receiver) is entitled to get his costs from the estate but such costs shall be added to the costs payable by appellant to respondent No 1

Appeal dismissed

BEFORE MR. D R. NORMAN, I C S

Crown .. Applicant.

Versus.

Bhaglu Nath and *others* .. Accused Respondents

Criminal Appeal No 9 of 1938 decided on 14th November 1938 against the order dated 10th December 1937 passed by the Additional Sessions Judge Ajmer in Sessions Case No 13 of 1937

(*a*) **Criminal Trial—Confession—Retracted—To be corroborated.**

The usual rule is not to convict on retracted confessions unless they are corroborated [Para 6]

(*b*) **Criminal Trial—Identification—Corpse decomposed to such an extent that its identity is doubtful—Prosecution must question about height**

If the identity of the corpse is doubtful the prosecution should further question the doctor to show that the height of the corpse was approximately that of the person alleged to be murdered [Para 7]

(*c*) **Evidence Act (I of 1872)—S 27—Two persons making statements leading to discovery of property—Only first statement can be proved.**

When two people make statements to the police leading to the discovery of property it is only the first statement made that can be proved under Section 27 of the Evidence Act. When several people make such

statements and it is doubtful as to who made the first statement all such statements should be ignored [Para 10].

Mr *Madan Mohan Kaul*—For the Crown

Mr *Abdul Rashid*—For the Accused.

Judgment.—This is an appeal by the Local Government against the acquittal of the three respondents on a charge of murder by the learned Additional Sessions Judge

2 About 10th May 1937 an old woman called Kajji disappeared from her village. On 23rd May a skeleton of an old woman was found in the jungle nearby The prosecution case is that Kajji was believed by the respondedts to be a witch and to have caused the death by witch-craft of two children of Bhagunath, respondent No 1 In revenge she was lured to the house of Bhagunath's sister, Gaindi (Respondent No 2) and was there murdered by Bhagunath, by Choganath (Respondent No 3), who is Bhagunath's nephew, and by Gaindi's husband, Ladunath The body was then thrown into the jungle.

3 Ladunath was discharged The principle evidence against the other three consists of their own confessions, which were retracted both before the Committing Magistrate and in the Sessions Court, and of the finding of a skirt, head dress and anklets said to belong to Kajji, concealed in the house of Gaindi There is also evidence of an extra judicial confession by Gaindi, and of statements made by Bhagunath and Gaindi to the police which led to the discovery of Kajji's clothes.

4 All the four assessors held that the case was not proved against the accused

5. The evidence has been dealt with at some length by the learned Additional Sessions Judge I generally agree with his remarks and have not much to add.

6 There are no grounds in this case for departing from the usual rule not to convict on retracted confessions unless they are corroborated Further, Gaindi's confession is not an admission of guilt since she nowhere says that she had lured Kajji to her house for the purpose of having her murdered.

7 I agree with the learned Additional Sessions Judge that the identity of the corpse found is not conclusively proved It wore no clothes from which it could be identified It was of a woman of at least 40 years old who had died from 7 to 21 days before the post mortem which was on 25th May This shows that the corpse might be Kajji's, and as Kajji has disappeared and apparently no one else has, it probably is Kajji's But that is not conclusive proof The learned Additional Sessions Judge has rightly remarked that the prosecution should have further questioned the doctor to show that the height of the corpse was approximately that of Kajji

8 The prosecution case really rests on the identification of the property found in Gaindi's house The witnesses who identify it as Kajji's are Soni P W 2 Jewan, P W 11 and Bhura, P W 14 Soni identifies the skirt, the head dress and the anklets, though when first shown the articles she said that she could not identify the anklets. She states that she knew the articles because Kajji had slept in her house for a month before her disappearance The articles being of common pattern, I am not satisfied that she would have got to know their appearance so well as to be certain of their identification Jewan identifies the head dress and the anklets But when shown the property before a Magistrate mixed with similar property he picked out a wrong skirt. Now if he can make a mistke as regards the skirt he may be equally mistaken as regards the head dress and the anklets Bhura identifies only the head dress and this because he had seen

Kajji wearing it on one occasion I agree with the learned Additional Sessions Judge that the identification of the property is not proved

9 The extra judicial confession was made to Kesra, P W 3 There was no reason why Gaindi should confess to Kesra, and from substance of the confession as given by the witness it implicates only the three men It is not therefore a confession at all and is irrelevant

10 According to the prosecution evidence both Bhagu Nath and Gaindi told the police that Kajji's clothes would be found in Gaindi's house When two people make statements to the police leading to the discovery of property it is only the first statement made that can be proved under section 27 of the Evidence Act In this case it is not certain who made the first statement One Panch Kala, P W 8, says that first Bhagunath made the statement and then Gaindi repeated it But the other Panch Gokal, P W 5, says that Bhagunath said nothing but that Gaindi said that Kajji's clothes would be found in her house. There being no reason to accept one of these versions rather than the other, this part of the evidence must he ignored altogether

11 There is no further evidence of any importance The appeal is rejected and the bail bonds of the respondents are cancelled

Appeal rejected.

BEFORE MR D R NORMAN, I C S

Rajendra Kumar and *others* .. Accused Applicants.

Versus

Crown .. Complainant Opposite party

Criminal Revision No *60 of 1938* d c de.l on 16th December 1938 arising out of tho order dated 28th October 1938 passed by the Second Additional Sessions Judge Ajmer in Criminal appeals Nos 169 to 175 of 1938

Criminal Procedure Code (V of 1898)—S 423—Acquittal or Retrial—General Rule—Acquit when prosecution failed to prove facts on which conviction founded

When the prosecution has failed to prove the facts on which a conviction can be founded the proper order is that the accused should be acquitted unless the case is of such importance as to warrant a retrial [Para 3]

Mr *Mukut Behari Lal Bhargava*—For the Applicant
Mr *Madan Mohan Kaul*—For the Crown

Order—This is an application to revise an order for retrial. It was alleged that accused No 1 had entered an Istimarari village after the Istimarardar had issued a notice prohibiting the entry of congressmen and had delivered a speech advocating non payment of rent He was convicted of criminal trespass. Accused Nos 2 to 5 who belonged to the village were convicted of abetment On appeal the learned Second Additional Sessions Judge held that the case against accused No 1 was defective because the written notice issued by the Istimarardar had not been produced and because one Madan Bari who is said to have directed accused No 1 not to enter the village had not been examined The Judge further remarked "There is also no evidence to show how the other accused abetted the offence of criminal trespass

2 It is impossible to tell from the very confused judgment of the trial Magistrate whether he considered that

the trespass lay in entering the village after the Istimarardar's prohibition or in the delivery of the speech But in appeal the case was clearly dealt with on the footing that the offence lay in entering the village afer the Istimarardar's prohibition

3 It is argued that when the prosecution has failed to prove the facts on which a conviction can be founded the proper order is to acquit the accused and not order a retrial In my view this argument correctly states the general rule although there may be particular cases of such importance as to justify a retrial I do not however think this is one of them Production of the written order of the Istimarardar would not help the prosecution, since an otherwise innocent act cannot be turned into an offence by the issue of an order which is not served on the accused person On this point the evidence of Madan Bari would no doubt be relevant, but I do not see why the accused should undergo the worry and expense of other trial because the prosecution failed to produce their most important witness

4 I allow the application, set aside the order for retrial and direct that the accused be acquitted

Revision allowed.

BEFORE MR D R NORMAN, I C S

Ale Rasul Ali Khan, Dewan Syed — Judgment Debtor-Appellant

Versus

Bal Kishan, Seth and *others* — Decree Holders-Respondents

Miscellaneous Civil 2nd Appeal No 45 of 1938, decided on 18th March 1939, arising out of the order, dated 15th September 1938, passed by the 2nd Additional District Judge, Ajmer, in Civil Appeal No, 21 of 1938,

(a) **Mortgage—Apportionment—Part of property unavailable because mortgagor had no title to it—whole amount can be realised from remaining property: Transfer of Property Act (IV of 1882), S 82**

No apportionment of the morgage debt can be ordered when part of the security becomes unavailable because the mortgagor has not the title to it which the mortgage deed sets out [Para 4]

(b) **Mortgage—Improvements—No deduction for —**

If a mortgagor makes additions or improvements to the mortgaged property he is not entitled to deduct the cost of the additions and improvements from the amount due at the foot of the mortgage. If the property is sold for more than the amount of the debt the mortgagor will himself get the advantage of the improvements. If it is not it is equitable that the morgagee rather than the mortgagor should get the benefit of them. [Para 5]

(c) **Civil Procedure Code—S. 11 (Expl IV)—Execution Proceedings—Principles apply:**

It was held previously in Execution Proceedings that the property was saleable Subsequently the Judgment sought to raise the question that he had a right of residence in the property *Held* the previous order decided by implication that all the judgment debtor's rights in the property were saleable in execution and thus operates as *res judicata* so far as that execution petition was concerned [Para 6]

Sir Syed Wazir Hasan (of Allahabad) and *R B Mithan Lal Bhargava*—For the Appellant.

Mr Ghasi Lal—For the Respondents.

Judgment—The first question which I have to determine in this second appeal is my jurisdiction to hear it. The appeal arises out of execution proceedings which commenced in the Court of the First Class Subordinate Judge Ajmer, in 1920 and is therefore governed by Regulation I of 1877 As the order of the Trial Court was reversed by the District Court a second appeal lies to the Chief Commissioner under section 15 of that Regulation By section 4-A of the Regulation the Governor General in Council may appoint any person to exercise the powers of a Chief Commissioner

under section 15 In practice the Judicial Commissioner for Ajmer-Merwara for the time being was so appointed, and accordingly when I was appointed Judicial Commissioner in 1933, I was also appointed under section 4-A, the appointment however being by name (See Notification 547-I, dated 24th October 1933) In 1934 I relinquished the charge of the post of the Judicial Commissioner in Ajmer-Merwara and resumed it in 1935 In 1937, I again relinquished the charge and resumed it in October 1938 But I cannot trace any further Notifications under section 4-A subequent to Notification No 547-I This is propably because it was supposed that by 1934 all cases falling under Regulation I of 1877 had been disposed of The question is therefore whether Notification 547-I is still in force In my judgment it is Although, as I have said, powers were in practice delegated under section 4-A to the Judicial Commissioner for the time being there is nothing in law to prevent the powers being delegated to another person In Notification No 547-I, I am appointed by name, and my office is not mentioned It therefore appears to me that this Notification not having been cancelled or replaced by any subsequent Notification is still in force and that I have jurisdiction to hear this appeal.

2 The facts are fully set out in the judgment of the lower appellate Court and I do not propose to repeat them. At the outset I must observe that the powers of the Chief Commissioner under section 15 of Regulation I of 1877 are limited The Chief Commissioner under that section may "receive a second appeal, if, on a perusal of the grounds of appeal and of copies of the judgments of the subordinate Courts, a further consideration of the case appears to him to be requisite for the ends of justice"

3 The first point taken is that the Subordinate Judge, First Class, though he had jurisdiction to entertain the execution application, lost his jurisdiction on the replacement

of Regulation I of 1877 by Regulation IX of 1926 Under both Regulations the financial jurisdiction of the Subordinate Judge First Class, is limited to Rs 10 000/ Under each Regulation he may be invested with additional powers to hear suits without any pecuniary limit. Under Reuglation I of 1877 the Commissioner had authority to invest him and did in fact so invest him for purposes of trying the suit out of which this darkhast arises But under Regulation IX of 1926 the Subordinate Judge could only be invested with unlimited financial jurisdiction by the Chief Commissioner and he was not so invested Ordinarily when an Act is replaced by another Act on the same subject all Notifications under the former Act survive but it is argued that they will not survive when the authority empowerd to issue the Notification is different This is an interesting point of law, but I do not propose to discuss it, since in my view, whether the trial Court had or had not the necessary financial jurisdiction the ends of the justice do not require that proceedings be re-opened from 1927 On the contrary looking to the very lengthy period during which the judgmeat debtor has succeded in postponing execution it would be manifestly unjust that execution should be further postponed on any technical plea.

4 The second point is as follows The decree is a mortgage one and there were seven mortgaged properties It was held that the original mortgagor whose legal represen tative the present appellant is, had only a life interest in five of these properties To the 6th property a third person has proved his title and execution is thus sought against one property only It is argued that execution should only be allowed for an amount proportionate to the value which this property bears to the whole property mortgaged For this proposition no authority is advanced There have been cases when apportionment has been ordered because owing to the negligence of the mortgagee part of the security has been lost. But such cases have no application when part of the security

becomes unavilable because the mortgagor has not the title to it which the mortgage deed sets out.

5 The next point taken is that the mortgagor has made additions and improvements to the mortgaged property subsequent to the decree and that he is entitled to deduct the cost of the additions and improvements from the amount due at the foot of the mortgage. No authority is quoted for this proposition, and it does not commend itself to me. If the property is sold for more than the amount of the debt the mortgagor will himself get the advantage of the improvements If it is not, I consider it equitable that the mortgagee rather than the mortgagor should get the benefit of them

6. The last point taken is that appellant has, as Dewan, a right of residence in the Haveli which is to be sold. The lower appellate Court held that he should establish that by separate suit. In my view the point could not be taken at the stage at which it was taken. The question which of the mortgaged properties could be sold under the decree was considered by the Court in 1933, and it was held then that the Haveli was saleable. This judgment decides by implication that all the judgment debtor's rights in the Haveli were saleable in execution and thus operates as *res judicata* so far as this execution petition is concerned. Whether a separate suit can be filed to establish appellant's right of residence is a matter on which I express no opinion.

7. I confirm the order of the lower appellate Court and dismiss this appeal with costs

Appeal dismissed.

BEFORE MR D R NORMAN, I C S

Naurang Rai Sharma, Pt — Applicant.

Versus.

Sita Ram Patwari and *others* — Opposite party

Small Cause Court Revision No. 76 of 1938, decided on 21st March 1939 against the judgment dated 27th April 1938 passed by the Judge, Small Cause Court, Beawar in Small Cause Court Suit No. 1012 of 1934

(a) Contract Act (IX of 1872)—S 134 and S. 137—Suit against Principal debtor barred—It is also barred against the surety:

A surety is discharged when at the date of the suit against him the creditor's remedy againft the principal debtor has become barred by time *24 A 504 50 A 211 and 1936 Pat 20* **Foll** *5 B 647 33 B 308 1927 Lahore 396 and 1929 Nagpur 145* **Not Foll.**

(b) Limitation Act (IX of 1908)—Art. 60—Demand made but only part of amount due paid—Later demand will not give fresh cause of action:

A demand was made and as a result of this demand some payment was made It was argued that a later demand gave a fresh cause of action *Held* that would only be so if full payment had been made on the first demand and the second demand were for a sum not due when the first demand was made (Para 6)

Mr Jagan Nath Sharma—For the Applicant
Mr Som Datt Bhargava—For the Opposite party

Order —This application arises on a suit filed against two principals and a surety The trial Court held that the suit was time barred against the principals It was argued relying on certain Allahabad decisions that the suit must also be time barred against the surety, but the trial Judge relying on some decisions of other High Courts held that it was not. He thought that Article 60 applied and that time began to run against the surety from the date on which demand was made He therefore passed a decree against the surety who has come in revision.

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though it had become barred when it was sought
cipal debtor As pointed out in *Anand Singh*
a suit against a surety is in time if filed before
inst the principal debtor has expired The
bad rulings were expressly distinguished on this
attention has also been invited to a decision of
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hich the Allahabad view has been taken namely
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. Kishna Rav[6], *Subhramania Aiyar V Gopala*
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Section 134 runs as follows —

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y act or ommission of the creditor, the legal consequence of
is the discharge of the principal debtor"

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2 54 A 1007 3 1936 Peshawar 20 4 24 A 504.
5 50 A 211 6 5 B 647 7 33 M 308 8 1927 L. 396 9 1929 Nag 145

Section 137 runs as follows —

> Mere forbearance on the part of the creditor to sue the principal debtor or to enforce any other remedy against him does not, in the absence of any provision in the guarantee to the contrary discharge the surety

The majority view is that as in a personal action limitation bars merely the remedy but does not affect the right, the principal debtor is not discharged if not sued within limitation This view is said to be in accordance with the English law

5 The Allahabad view is that as the legal consequence of failing to sue the principal within time is that he cannot be made to pay the debt, that consequence amounts to a *discharge*, and *forbearance under section 137 will then mean* forbearance within the period of limitation It is further suggested that the object of section 137 is to explain section 135 which enacts that if a creditor promises not to sue the principal, the surety is discharged. In 1936 Peshawar 20 it is further argued that there can be no forbearance to sue for a time barred debt since a man cannot forbear to do what he had no legal right to do On the whole I prefer the arguments set fortb in the Allahabad and Peshawar decisions I think that a creditor is legally discharged when he cannot be sued even though the right may subsist. I therefore propose to follow the view of the Allahabad High Court and to hold that a surety is discharged when at the date of the suit against him the creditor s remedy against the principal debtor has become barred by time

6 The application must also succeed on another ground, for time can only run from the date of demand from the surety if that demand is part of the cause of action It was therefore incumbent on the plaintiff to set out the date of demand in his plaint, and he has not done so Further, the finding of the Court that demand was made for the first time

on 28th July does not appear to be correct The Court remarks —

"There is nothing on the record to show that defendant No 3 (his surety) was called upon to pay the amount earlier"

But Exhibit P. 3 which is a letter from one of the principal debtors to the creditor refers to a demand made upon the surety on 31-7-1931 which is more than three years before the date of suit Mr. Som Dutt for opponent argues that as a result of this demand some payment was made, and therefore a later demand gave a fresh cause of action That would be so if full payment had been made on the first demand and the second demand were for a sum not due when the first demand was made. But admittedly on the date of the first demand the whole amount was due Therefore time began to run more than three years before the date of plaintiff's suit, and it is time barred against the surety.

7 I allow the application, set aside the decree of the trial Court so far as it is against the applicant and dismiss opponent's suit against applicant with costs in both Courts

Application allowed.

BEFORE MR. D R NORMAN, I C S

Sri Lal . . .... Decree Holder-Applicant.

Versus

Mst Jhamku .... Judgment Debtor-Opposite party.

Small Cause Court Revision No. 81 of 1939, decided on 16th March 1939, arising out of the Order, dated 19th September 1938, passed by the 2nd Additional District Judge, Ajmer, in Misc. Civil Ex. Appeal No. 6 of 1937.

Civil Procedure Code (V of 1908)—S 50—Nearest heir is Legal Representative irrespective of having got his estate; Execution

Legal representative means the person who in law represents the estate of the deceased and it is therefore immaterial whether such person has actually obtained possession of the estate or even whether the deceased left any estate *17A 431* Foll (Para 3)

Mr *Shri Krishan*—For the Applicant
Mr *Daya Shanker Bhargava*—For the Opposite party

Judgment—Applicant obtained a money decree in the Court of Small Cause, Deoli, against one Gulab Chand and as he wished to execute it against immoveable property he obtained a transfer for execution to the First Class Subordinate Judge, Deoli During execution proceedings Gulab Chand died, and the applicant applied to the Subordinate Judge for execution against his mother Jhamku The Subordinate Judge held that the application must be made to Small Cause Court and kept the darkhast pending until such application was made I should say here that the same Judge exercises the function of Judge Small Cause Court and First Class Subordinate Judge, Deoli Application having been made on the Small Cause side, Jhamku objected that no property of Gulab Chand had come to her Applicant contended that consideration of this point should be deferred until leave to execute had been given The Judge however took evidence and found that applicant had failed to prove that Jhamku was in possession of any property of Gulab Chand, and he ordered that execution could not proceed against her He signed this order as Subordinate Judge, First Class An appeal to the District Court was preferred, but the 2nd Additional District Judge held that under whatever designation the trial Judge had signed the order he was acting as Judge, Small Cause Court, and the appeal was therefore incompetent. Applicant has preferred a second appeal and asks that in the alternative his appeal may be treated as an application to revise the order of the trial Court.

2 I agree with the 2nd Additional District Judge that no appeal lay. The trial Judge's order was passed on an application presented to the Small Cause Court and the fact that the Judge mis-described himself is immaterial But he will, I hope, be more careful in future to distinguish between his various capacities.

3. Treating the appeal as an application to revise the original order of the Small Cause Court, it must succeed. Legal representative means the person who in law represents the estate of the deceased, and it is therefore immaterial whether such person has actually obtained possession of the estate or even whether the deceased left any estate Now Jhamku is admittedly Gulab Chand's nearest heir and therefore in the absence of a will the person who in law represents Gulab Chand's estate The finding that she had not got possession of Gulab Chand's estate was therefore irrelevant This view is in accordance with the decision in *Seth Shapurji Nana Bhai* vs *Shanker Dat Dube*[1] in which it was said:—

> "The Court which passed the decree having decided who is to be regarded as the legal representative, it is for the Court executing the decree to decide as to the extent of that legal representative's liability"

4. I allow the application, set aside the order of the trial Judge and direct that execution do proceed against Jhamku Opponent must bear the costs of this application, but the order for costs passed by the 2nd Additional District Judge is of course not affected

1 17 A 431

Application allowed.

BEFOR MR D R NORMAN, I C S

Sukh Ram Plaintiff Applicant

Versus

Messrs Lalta Pershad Perbhu Dayal Defendants Opposite Party

Small Cause Court Revision No 80 of 1938 decided on 20th March 1939 arising out of the order dated 26th July 1938 passed by the Judge Small Cause Court Nasirabad in Small Cause Court Suit No 191 of 1938

Practice—Judicial order—Ex-parte proceedings—Must be before the Judge and not the clerk:

An ex parte suit is as much a judicial proceedings as a contested suit. Plaintiff has to prove his case by evidence, and unless the Judge himself hears the witnesses he cannot Judge whether they are telling the truth. (para 2)

Mr *Hira Lal Jain*—For the Applicant

Mr *Ram Chandra Arun*—For the Opposite party

Order —Applicant filed a suit against opponent in the Court of Small Cause Nasirabad When the suit was called out applicant was absent and therefore according to what is apparently the custom of the Court, the evidence of the plaintiff and his witnesses was recorded by the Reader who drafted a judgment and put it up to the Judge for signature But before the Judge considered the draft, opponent s counsel, Mr Arun, stated that he had not heard the suit called out, and asked leave to file an application under Order 6, Rule 4 asking for further particulars As the Judge had not signed the ex parte judgment he held, without hearing the plaintiff on the point, that the suit was still in being and directed that notice of the application under Order 6, Rule 4 should be served upon the plaintiff It is sought to revise this order on the ground that an ex parte decree could not be set aside without notice to the plaintiff

2. The application must fail The proceedings were irregular throughout The Judge for whose explanation I have called, states that ex-parte proceedings are always taken before the Reader and that if this were not done the Court could not get through its work As I have said several times already it is no excuse for illegal proceedings' that the Judge can thereby do his work more quickly An ex-parte suit is as much a judicial proceedings as a contested suit Plaintiff has to prove his case by evidence, and unless the Judge himself hears the witnesses he cannot decide whether they are telling the truth It was of course irregular for the Judge to take up the suit again after the plaintiff had gone and without notice to him But in this case one irregularity has cancelled out the other The proceedings before the Reader being null and void there was nothing to set aside

3 Plaintiff's suit remains on the file and the order directing notice to him of the application under Order 6, Rule 4 must stand Applicant must pay opponent's costs in this application.

Application rejected

BEFORE MR D R. NORMAN, I C S

Official Receiver, Ajmer Applicant

Versus

Allarakha Yusuf .. . Insolvent—Opponent.

Civil Revision No. 14 of 1939, decided on 23rd March 1939, arising out of the order, dated 12th January 1939, passed by the 2nd Additional District Judge, Ajmer, in Miscellaneous Appeal No. 85 of 1938.

Provincial Insolvency Act, (V of 1920)—S. 2 (d) and S 28 (2)—All property whether within or without British India vests in Receiver !

All property of an insolvent whether within or without British India vests in the Official Receiver [Para 3]

Mr Raghu Nath Agarwal—For the Applicant.

Mr Daya Shankar Bhargava—For the Opposite party

Order—The firm Abdulla and Sons consisting of two partners Yusuf Abdulla and Allarakha was adjudicated insolvent. Yusuf Abdulla was entitled to the interest of certain property situated in Akola in Berar The Official Receiver wrote to the trustee asking that the income of the property should be remitted to him instead of to Yusuf Abdulla Thereupon Allarakha applied to the Court alleging that the property was *wakf* for the maintenance of Yusuf Abdulla and asking the Court to cancel its order The application might have been rejected summarily firstly because the Court had passed no order and secondly because Allarakha had no locus standi The Judge however gave notice to the Official Receiver and framed issues, one of which was —

> Is Berar not part of British India and has this Court no jurisdiction to order attachment ?

The Court held that Berar was part of British India and that the property was not *wakf* It therefore dismissed the petition Allarakha appealed and the learned Second Additional District Judge, though holding that the property was not *wakf* held that Berar was not British India, that the income did not vest in the Official Receiver and that he could not call upon the manager of the trust to remit it. Against this decision the Official Receiver has appealed and asks that if an appeal does not lie his appeal may be treated as an application in revision

2 I am inclined to think that an application in revision is the appropriate remedy, but as I have in either case jurisdiction the point is unimportant

3 The order of the appellate Court is wrong In the first place Allarakha was incompetent either to make the application or to file an appeal, In the second place all property of an insolvent whether within or without British India vests in the Official Receiver (See section 28(2) read with section 2(d) of the Provincial Insolvency Act). The Official Receiver is therefore entitled to get possession of the property by any means that he can It is thus unnecessary to consider whether Berar is a part of British India That question might arise if the Official Receiver finds it necessary to ask for an order of the Court against the trustee, but as the trustee is not represented in the present proceedings it would be quite useless to determine it now

4 I allow the appeal, set aside the order of the Second Additional District Judge and dismiss Allarakha's application with costs in all three Courts.

Appeal allowed

BEFORE MR D R. NORMAN, I C S.

Ismail .... Judgment Debtor--Appellant

Versus.

Wali Mohammad .... Decree Holder—Respondent

Miscellaneous Civil Second Appeal No 8 of 1939, decided on 12th April 1939, arising out of the order, dated 31st January 1939, passed by the 2nd Additional District Judge, Ajmer, in Miscellaneous Civil Appeal No 83 of 1936.

Civil Procedure Code (V of 1908)—S 55 and S 60—Salary not attachable—Even no arrest:

The salary of the Judgment debtor was not attachable. *Held*, warrant of arrest should not issue To allow a decree holder to proceed by way of arrest where he could not proceed by way of attachment would be to make the law ridiculous (Para 2)

Messrs Milap Chand Chhabra and *Chunni Lal Agarwal*—For the Appellant.

Mr Jawand Lal Datta Choudhry—For the Respondent.

Judgment—Respondent decree holder applied for the arrest of the appellant judgment debtor The trial Judge held that the judgment debtor did not get more than Rs. 30 to 35 a month and dismissed the application upon terms that the judgment debtor should pay Rs 8/ per month The decree holder appealed and the 2nd Additional District Judge holding that even on the judgment debtor s evidence he got at least Rs 39/ per month made an order for arrest

2 The 2nd Additional District Judge being the final Court of facts ought to have determined what the judgment debtor s means were I agree with the trial Judge that the evidence led on behalf of the decree holder that the judgment debtor besides being a fitter in the Loco Shops owns three private shops is not satisfactory Taking the judgment debtor s income at Rs 40/ per month I do not think that a warrant of arrest should issue No portion of such salary would be attachable even under the Civil Procedure Code before its recent amendment. To allow a decree holder to proceed by way of arrest where he could not proceed by way of attachment would be to make the law ridiculous

3 I allow the appeal, set aside the order of the lower appellate Court and restore that of the trial Court. The appellant should get his costs both in this Court and in the lower appellate Court.

Appeal allowed

BEFORE MR. D R NORMAN, I C S

Ghulam Chisty, S ... . Plaintiff—Appellant

Versus

Fateh Mohammed, S. Defendant—Respondent

Civil Second Appeal No. 40 of 1938, decided on 15th March 1939, arising out of the judgment, dated 22nd August 1938, passed by the 2nd Additional District Judge, Ajmer, in Civil Appeal No 53 of 1936

Ajmer Laws Regulation (III of 1877)—S. 8 and S. 11—Pre-emptor cannot pick and choose :

Several properties were sold. The Pre-emptor had a right of Pre emption in more than one of them but he filed a suit for pre emption with respect to one only. *Held*, the pre-emptor cannot pick and choose, and a suit for partial pre-emption does not lie where the pre-emptor has also a right of pre-emption in properties other than those in respect of which he institutes the suit, *1934 P C* **Foll.** *1936 Allahabad, 632* **Distinguished.**

Sir Syed Wazir Hasan and *Mr Ballabh Das Khanna*—For the Appellant

Mr. Ghasu Lal—For the Respondent

Judgment.—This second appeal arises out of a suit for pre-emption Four properties were sold namely a separated portion of one house, property No 1, an undivided share in two houses, properties Nos 2 and 3, and right to collect dues from pilgrims, property No. 4 The suit was in respect of the first property only and was founded on vicinage Admittedly however the plaintiff was a co-sharer in the other two houses which have not been divided by metes and bounds. On behalf of the vendee, defendant No 1, it was contended that the plaintiff could have claimed to pre-empt the vendor's share in houses 2 and 3 as well as his divided portion of house No 1, and that a suit for partial pre-emption did not lie In reply to this plaintiff contended that the custom permitting co-shares to pre-empt had not been proved.

2 The trial Court dismissed the suit. It held that co shares had a right of pre-emption and that according to the Privy Council decision *Birendra Bikram Singh Vs Brij Mohan Pande*[1] a suit for partial pre-emption did not lie. This decision was confirmed in first appeal upon the same grounds

3 In the Courts below arguments were principally directed to the question whether co sharers had a right to pre-empt. This right however has not been disputed before me and Sir Syed Wazir Hasan for appellant has mainly devoted his argument to distinguishing the Privy Council decision on the ground that there the right to pre empt was statutory under sections 7 and 9 of the Oudh Laws Act (which are indentical with sections 7 and 9 of the Ajmer Laws Regulation) whereas here the right is based on custom as provided by section 8 of the Ajmer Laws Regulation I have considerable doubts about the soundness of this distinction The decision of the Privy Council was based upon the fact that, under section 11 of the Oudh Laws Act, the pre-emptor must tender "the price aforesaid, that is to say the total price of all the properties comprised in the sale deed. Section 11 of the Oudh Laws Act is identical with section 11 of the Ajmer Laws Regulation and that section applies whether pre emption is claimed under sections 7 and 9 or under section 8

4 This judgment of the Privy Council was cited in argument in an Allahabad case *Zainab Bibi Vs Umar Hayat Khan*[2] in which the pre-emptor sought to pre-empt a portion only of the property sold because she had no right of pre emption in the remaining properties. The learned Judges allowed pre emption holding that partial pre-emption had always been allowed when the pre emptor could not legally pre empt the whole property They distinguished the Privy

(1) A. I R 1934 P C. 1933. (2) A I R. 1936 A 63.

Council ruling on the ground that the provisions in the Oudh Laws Act about pre-emption did not find place in the law there applicable, namely the Agra Pre-emption Act This case therefore does not help the appellant, and I am inclined to think that effect of the Privy Council ruling is that partial pre-emption is not allowed even when the pre-emptor could not legally pre-empt the remaining property. It is not however necessary for the puposes of this appeal to decide that point For in *Zainab Bibi Vs. Umar Hayat Khan* the learned Judges remarks:—

> "No doubt it is a well settled principle that a pre-emptor cannot be allowed to pick and choose and pre empt only as much property as he considers convenient to get. In that sense partial pre-emption cannot be allowed"

Now here as the plaintiff could have pre-empted the vendor's share in the second and third properties he is, in my judgment, "picking and choosing" It is argued that this rule will not be applicable here because the plaintiff's title to pre-empt property No 1 is based on vicinage and his title to pre-empt properties 2 and 3 is based on co-sharership. But no authority for grafting this exception on the general law is cited nor do I see any logical reason why such an exception should be allowed Under the Mohammedan Law, upon which the custom of pre-emption where it exists in Ajmer-Merwara is based, the right of a co-sharer is superior to that of a neighbour If plaintiff's title to pre-empt all three properties had been founded on vicinage, partial pre-emption would clearly be barred by the rule against "picking and choosing" I therefore do not see why there should be an exception to that rule when part of the plaintiff's title to pre-empt rests on something superior to vicinage namely co-sharership

5. I confirm the order of the lower appellate Court and dismiss this appeal with costs in favour of respondent No. 1

Appeal dismissed.

BEFORE MR D R NORMAN, I C S

Pukh Raj and *others* .. Plaintiffs—Applicants

Versus

Ram Jeewan Defendants—Opposite party

Civil Revision Application No. 83 of 1938 decided on 16th March 1939 arising out of the order dated 12th May 1938 passed by the Sub Judge Beawar in Civil Suit No 138 of 1936

(a) Court Fees Act (1870)—S 7 (IV-a) and Sch. II, Art. 17 (3)—Injunction claimed as consequential relief—S 7 (IV) applies.

Schedule II Art. 17 (*iii*) only applies when no consequential relief is sought Where consequential relief is sought, *e.g.*, an injunction the prayer comes under S 7 (*iv*) which enacts that Court fee is payable *ad valorem* on the amount at which plaintiff values his claim a single valuation covering both declaration and injunction. [Para. 3]

(b) Court Fees Act (1870)—S 17—Prayer for several declarations arising out of one deed—Single Court Fees:

When plaintiff's request to relief arises out of a single cause of action, *e.g* a deed of relinquishment he is only asking for a single declaration even though the declarations sought are with respect to several plots. [Para 3]

(c) Court Fees Act (1870)—S 7 (X)—Suit for specific performance of a portion comprised in the contract—Court Fee on proportionate consideration:

Where a deed comprises a good deal of property but the suit for specific performance is filed with respect only to a portion of the property comprised in the deed. *Held* For purposes of Court fee consideration must be apportioned between various items comprised in the deed [Para. 4]

(d) Court Fees Act (1870)—S. 17—Reliefs in the alternative—Court Fees only on relief with highest valuation.

Where reliefs claimed are alternative Section 17 of the Court Fees Act does not apply and Court Fee is payable on the relief which bears the highest valuation.

Mr Jyoti Swarup Gupta—For the Applicant.

Mr Shiam Sunder Bhargava—For the opposite party

Order.—This is an application to revise an order of the Subordinate Judge, Beawar, directing payment of Additional Court fee. The facts set out in the plaint are that plaintiff's father and defendant No 1 formed a partnership, and that after business ceased defendant No. 1 executed a deed of relinquishment in favour of plaintiff's father of all the assets of the partnership Accordingly plaintiff got his name entered in the revenue record against five plots of land some of which the firm held as owner and some as mortgagee. Defendants 2 to 7 were the tenants of these plots Subsequently defendant No. 1 got his own name restored. The prayers are —

1. (*a*) That plaintiff be declared exclusive owner or mortgagee as the case may be of the five plots,

   (*b*) That defendants 2 to 7 be declared tenants-at-will,

   (*c*) That the order restoring defendant No. 1's name in the revenue record be cancelled,

2. That an injunction be issued against defendant No. 1 not to take the produce of the lands,

3. That an injunction be issued against defendants 2 to 7 against giving produce to defendant No. 1

In the alternative plaintiff prayed for specific performance of the deed of relinquishment. A fixed fee of Rs. 10/- was paid in respect of the declaration under Article 17(iii) of schedule II of the Court Fee Act The injunction was valued at Rs 50/- and stamp of Rs 3/12/- was paid thereon. A stamp of Rs 10/- was paid on the the prayer for specific performance.

2 On objection by defendant No. 1 the trial Judge held that as there were five plots, plaintiff was seeking for five declarations and injunctions and that separate fee was payable on each. He further held that, as the consideration

of the deed of relinquishment was Rs 1,000/, the prayer for specific performance of that deed must be valued at Rs 1 000/

3 My first remark is that the method of stamping the plaint is any how wrong Schedule II, Art 17(iii) only applies when no consequential relief is sought Here consequential relief is sought namely an injunction, and this portion of the prayer comes under section 7(iv)(a) which enacts that Court fee is payable *ad valorem* on the amount at which plaintiff values his claim, a single valuation covering both declaration and injunction This error however can be cured by holding that the claim for declaration and injunction was valued at that amount for which Rs. 13/8/ is the appropriate stamp On the question whether Court fee is payable on five declarations or on only one, it is argued that, as plaintiff's right to relief arises out of a single cause of action, namely the deed of relinquishment he is only asking for a single declaration Had plaintiff confined his prayer to a declaration against defendant No 1 this would be correct. But he has also asked that defendants 2 to 7 be declared tenants at will The status of defendants 2 to 7 is independent of the deed of relinquishment, and as there is no community of title between the tenants of the five plots the plaintiff is really seeking for a separate declaration as against them in respect of each plot. It is argued that the tenants do not claim to be anything better than tenants at will and so there is no question in dispute between them and the plaintiff If so a prayer for a declaration that they are tenants at will is superfluous and plaintiff may apply to strike that prayer out. But if he does not do so plaintiff must pay one Court fee for the delaration of his title as against defendant No 1 and five separate fees for the declaration of his title as against the tenants.

4 As regards the Court fee on the alternative prayer for specific performance it is conceded that such prayer must

be valued *ad valorem* on the consideration But it is argued that the deed or relinquishment camprises a good deal of property besides the five suit plots, and that for the purposes of Court fee consideration must be apportioned between various items comprised in the deed I agree that the consideration should be apportioned But unfortunately the plaint does not state what portion of Rs 1,000/- was consideration for the suit plots and reads, since it treats the prayer for specific performance as if a fixed fee of Rs 10/- were payable thereon. Nor does the deed of relnquishment itself give separate valuation of the various items therein comprised. Plaintiff therefore, if he wishes to pay Court fee on less than Rs 1,000/-, must file a statement showing what proportion of Rs 1,000/- was consideration for the five suit plots

5 There is one more point The prayer for specific performance is alternative to the other prayers Where reliefs claimed are alternative section 17 of the Court Fee Act does not apply, and Court fee is payable on the relief which bears the highest valuation

6 I set aside the order of the trial Judge demanding additional Court Fee of Rs 157/8/- He will now calculate the Court fee payable in the light of the above remarks Defendants will bear their own costs in this application. But as the application became necessary mainly because the plaint did not clearly show how Court fee was calculated the applicant will bear the cost of the Government Pleader in addition to his own

Order set aside

BEFORE MR D R NORMAN, I C S

Shanker Lal and *others*] .. ... Plaintiffs—Applicants

Versus

Bhanwar Lal and *others* .. Defendants—Opposite parties

Small Cause Court Revision No 9 of 1939 decided on 16th March 1939 arising out of the Judgment dated 25th October 1938 passed by the Judge Small Cause Court, Ajmer in Small Cause Court Suit No. 71 of 1938

(a) Contract Act (IX of 1872)—S 92—Executants of a bond cannot adduce evidence to show that they signed as sureties:

Persons who have in terms signed a bond as principals are prohibited from adducing oral evidence to show that they signed as sureties. [Para 2]

(b) Contract Act, (IX of 1872)—S 134—Debtor insolvent but sued without sanction—Surety not released:

Suit was filed against the principal debtor who had already been adjudicated an insolvent without the leave of the Court required by S. 28 (2) of the Insolvency Act. *Held* that the remaining defendants, even if they were sureties, had not been discharged (Para 2)

Mr Kaushal Das Deedwania—For the Applicant

Nemo—For the Opposite parties.

Order—Applicant sued the five opponents on a bond. Execution was not denied As against opponent No 1 the suit was dismissed because he had been adjudicated an insolvent before the suit was filed and the leave of the Court required by section 28 (2) of the Insolvency Act had not been obtained Opponents Nos 2 to 5 contended that they had executed the bond as sureties only a contention which the Judge upheld He further held that the sureties were discharged under section 134 of the Contract Act by reason of applicant sueing opponent No 1 without the Court s leave

2 As against opponent No 1 the application is not seriously pressed. As against opponents 2 to 5 it succeeds on two grounds In the first place persons who have in terms signed a bond as principals are prohibited by section 92 of the Indian Evidence Act from adducing oral evidence to show that they signed as sureties (See Sarkar, Law of Evidence, 1932 Edition, page 691) In the second place even if they were sureties I do not think they have been discharged under section 134. Failure to obtain permission of the Insolvency Court before sueing Opponent 1, has not released them from the debt, it is still open to applicant to get opponent No. 1's name entered on the schedule of creditors in the Insolvency Court

3. I allow the application and set aside the order of the lower Court in so far as it dismissed applicant's suit against opponents 2 to 5 and grant a decree against them for Rs. 170/4/- together with future interest from the date of suit on Rs 105/- at 6 per cent and costs in both Courts

Revision allowed.

BEFORE MR D R NORMAN, I C. S.

Beni Prasad, Pandit . Decree Holder-Appellant.

Versus.

Sarfraz Ali and *others* ... Judgment Debtors-Respondents

Miscellaneous Civil Appeal No. 38 of 1938, decided on 14th. March 1939, against the order passed by the Sub Judge, Ajmer, in Ex. case No 344 of 1938 on 12th October 1938

(*a*) Civil Procedure Code (V of 1908)—S. 47—Order for stay of execution till condition is fulfilled—Order is appealable

The Trial Court passed an order staying execution till the sanction of the Chief Commissioner was obtained *Held,* the order was one refusing execution till some condition was complied with by the Decree Holder. It was therefore appealable.

(b) Ajmer Government Wards Regulation (I of 1888)—S 22—Mortgage executed before the Estate came under Court of Wards—Section has no application

The Section lays down that a Government ward is incompetent to charge his property It has no application to a mortgage which was executed before the Wards estate came onder the Court of Wards. [Para 3]

(c) Ajmer Government Wards Regulation (I of 1888)—S 17—Confined to private sale

The section requires the sanction of the Chief Commissioner to the sale by the Court of Wards of property under its management but that section obviously refers to a private sale, [Para 3]

Mr *Daya Shanker Bhargav*—For the Appellant

R B *Mithan Lal Bhargav*—For the Respondents.

Judgment—Appellant obtained a decree against one Sarfraz Ali through the General Manager, Court of Wards, and others for the sale of mortgaged property The preliminary decree was passed on 20-11 1936 and the final decree on 20 1 1938 An application for sale of the mortgaged property was filed on 8-4 1938, and the sale was fixed for 10-10 1938 But on 7 10-1938 the General Manager, Court of Wards, sent a letter to the Court asking for adjournment and undertaking to pay off the decree as funds permitted.

2 At the hearing same reference was made to sections 17 and 22 of Ajmer Government Wards Regulation, and the Court passed the following order—

> I have heard the parties and am of opinion that the provision of section 22 applies, hence I adjourn the sale till such time as necessary sanctioo is obtained under section 17 from the Hon'ble the Chief Commissioner

The present appeal is filed by the decree holder against this order

3 It is contended that no appeal lies as the order is merely one for stay of execution I am unable to agree The

order is one refusing execution unless some condition is complied with, apparently by the decree holder, and is therefore appealable On the merits the appeal must succeed Section 22 of the Regulation has no relevancy It lays down that a Government ward is incompetent to charge his property, but the mortgage in this case was executed before Sarfraz Ali's estate came under the Court of Wards Section 17 requires the sanction of the Chief Commissioner to the sale by the Court of Wards of property under management, but that section obviously refers to a private sale Rai Bahadur Mithan Lal states that what the Court of Wards wants to do is to satisfy the decree by selling part of the ward's property and therefore wants some time to get the sanction of the Chief Commissioner. This appears to be a new argument There is no reference to any proposed sale in the General Manager's letter of the 7th October Over two years have elapsed since the preliminary decree and over one year since the final decree, but it does not appear that sanction of the Chief Commissioner has yet been applied for In the circumstances I see no reason to give further time

4. I allow the appeal, set aside the order of the trial Court, and direct that the the mortgaged property be sold Costs of this appeal will be borne by respondent No 1

Appeal allowed

BEFORE MR D R NORMAN, I C S.

Dayal Dass .. Applicant

Versus

Crown .... Opponent

Criminal Reference No 7 of 1939, decided on 20th March 1939, made by the Additional Sessions Judge, Ajmer, by his order, dated 13th February 1939, in Criminal Revision No. 84 of 1938.

Press and Registration of Books Act (XXV of 1867)—§ 3 and 5. 5—There is Distinction between "Papers" and "Newspapers";

"Paper in S 3 does not mean a newspaper of a periodical nature. *10 P 492* **Not Foll** 1937 Bombay 28 **Distinguished.**

A B Abdul Wahid Khan—For the Crown
Applicant in person.

Order—This is a reference from the learned Additional Sessions Judge One Dayal Dass was convicted under section 12 of the Press and Registration of Books Act (XXV of 1867) for printing a paper without showing the printer's name thereon as required by section 3 of the Act and was fined Rs 20/ The paper was a manifesto by a new political association setting out its aims and objects and giving reasons why people should join it. The Additional Sessions Judge has quoted authority, with which he agreed for the proposition that the word "paper" in section 3 means practically a newspaper of a periodical nature and recommends that the conviction be set aside.

2 As against this view the Public Prosecutor argues that the Act deals with the printing of papers and the printing of newspapers in different sections (sections 3 and 5), the regulation for printing a newspaper being more detailed, and that the punishments for printing a paper and for printing a newspaper otherwise than in conformity with the Act are prescribed by different sections (sections 12 and 15) It, therefore, follows that the framers of the Act intended a distinction between "papers' and 'newspapers' Had "paper and "newspaper' been synonyms the words "or paper" in sections 3 and 12 would be otiose

3 In my judgment this argument is sound The first decided case relied on by the learned Additional Sessions Judge is *Rameshwar Prashad Verma* v *King Emperor*[1]

(1) I. L. R. 10 Patna 492

which states that the word "papers" in section 3 is practically, if not exactly, synonymous with the word "newspapers" as defined in section 1 of the Act The only reason given for this view is that the material part of the preamble to the Act runs —

> "Whereas it is expedient to provide for the regulation of printing-presses and of periodicals containing news"

Now sections 3 and 12 of the Act refer to "books" as well as "papers" Therefore, if the wording of the preamble is to govern the interpretation of the Act "book" must also be synonymous with "newspaper" I am, therefore, with all due respect, unable to agree with the reasoning in *Rameshwar Prashad Verma* v *King-Emperor*[1]

4 The Additional Sessions Judge also relies on a passage in the judgment of Beaumont C J in *Dattatraya Malhar Bidkar* v *Emperor*[2] in which he points out that if "paper" is to be given its widest meaning even an invitation to dinner must bear the name of the printer But the learned Chief Justice appreciated the force of the argument that the Act did show a clear intention to distinguish between newspaper and paper and he did not express any final opinion whether the decision in *Rameshwar Prashad Verma* v *King-Emperor*[2] was correct, but decided the case before him on another point.

5 For purposes of this appeal it is not necessary to decide whether a printed invitation and other documents of that kind are papers within the meaning of section 3 If they are, the public is to some extent safe-guarded by the improbability of anyone prosecuting in respect of such documents, and of any Magistrate inflicting more than a nominal penalty if such prosecution be lodged For purposes of this

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[1] 2 A I R 1937 Bom 28

reference, it is only necessary for me to decide whether the document in respect of which the present prosecution was lodged is a "paper" and I have no hesitation in deciding that it is

6 Let the record and papers be returned to the Additional Sessions Judge.

Conviction upheld

BEFORE MR D R NORMAN, I C S

Jasraj and *others* .. Accused—Applicants

Versus

Crown .. Complainant—Opposite party

Criminal Revision No. 6 of 1939 decided on 13th April 1939 arising out of the order passed by the Additional Sessions Judge Ajmer on the 10th January 1939 in Criminal Revision No 57 of 1938

(a) Ajmer Forest Regulation (VI of 1874)—S. 9 (Bye Law V)—'Zemindar' means a person entitled to get a share of Forest profits under S. 6 :

Zemindar means a person entitled to get a share of forest profits under section 6 of the Regulation that is to say a person who had a previous interest in the lands which have since been declared to be State forest. [Para 2]

(b) Ajmer Forest Regulation (VI of 1874)—Forest guard is not a Forest Officer

A Forest Guard since he is not appointed by the Chief Commissioner is not a Forest officer [Para 5]

Mr Kanhaiya Lal Verma—For the Applicants

Mr Abdul Rashid—For the Crown,

Order—Applicants have been convicted under bye law V of the Forest Bye Laws made under section 9 of the Ajmer Forest Regulation for failing to give aid in extinguish

ing a forest fire. The convictions were affirmed by the Extra Assistant Commissioner and a revision application to the Sessions Court failed

2. Two questions of law arise:—

(1) Are the applicants zemindars?

(2) Was their aid demanded by a Forest officer?

'Zemindar" is not defined in either the Bye Laws or the Regulation itself. The Courts below construed it in its ordinary meaning of land-holder. The applicants are Mahajans but it is not disputed that they hold land Two grounds are put forward for not giving the word its ordinary meaning

(*a*) In the "Rules for reduction of marriage and funeral expenses amongst the zemindars of the Ajmer-Merwara District" the term "zemindars" is by definition limited to certain castes.

(*b*) The term "Zemindars" occurs in bye law X(b) of the Forest Bye Laws There it means those persons entitled to get a share of forest profits under section 6 of the Regulation, that is to say the persons who had a previous interest in the lands which have since been declared to be State forest It is unlikely that the word 'zemindar" would be used in different senses in the same set of Bye Laws

3 There is little substance in the first argument The most that can be said is that as the word "zemindars" has a restricted meaning in the Marriage Rules, it might not be used in its ordinary meaning in other Bye Laws

4. Bur I find considerable force in the second argument The expression "zemindars" is only used twice in the Bye Laws; in Bye-Laws III & IV which define the duties and

responsibilities of zemindars when a forest catches fire and in bye law V(b) Now the persons termed "Zemindars" in bye law V are a clearly defined group and their common feature is not that they own land outside the forest, but that they once owned the land which has been declared to be forest If therefore the word "zemidar" was understood by the framer of the Bye Laws as meaning a person owning land he would not have used it in bye law V but would have used some such expression as "sharers or "persons entitled to share By using the word 'zemindar' he showed that it had a technical significance in his mind, and it would therefore not be proper to construe "Zemindar in its ordinary meaning in Bye Laws III & IV Further, it is not unreasonable that the persons who are getting a share of the profits should be the persons on whom the duty of helping to extinguish fires is cast

5 The demand for aid was made by a Forest Guard. "Forest Officer' is not defined in the Bye Laws but it is defined as follows in section 2 of the Regulation —

> "The expression Forest Officer' means any person or persons whom the Chief Commissioner of Ajmer from time to time appoints to exercise the powers and perform the duties hereby conferred and imposed on a Forest Officer

Ordinarily any word not defined in Bye Laws framed under any law should have the same meaning as in the law itself The Additional Sessions Judge dealing with the definition of Forest Officer in section 2 held that it is "a special definition and does not relate or apply to officers of the Forest Department.' But if so the word 'includes would have been used instead of "means.' The definition of Forest Officer in the Indian Forest Act is in similar terms except that it includes persons appointed by any officer empowered by the Local Government as well as officers appointed by the Local Government itself I presume that in the territories to which the Indian Forest Act applies any person

appointed to the Forest Department becomes a Forest officer under the definition. Similarly in Ajmer-Merwara any officer appointed to the Forest Department by the Chief Commissioner is a Forest Officer, although there may not be any reference to section 2 in the Notification appointing him But owing to the difference of wording between the Indian Forest Act and the Ajmer Forest Regulation persons appointed by some officer subordinate to the Chief Commissioner are not Forest officers What the reason for this difference is I do not know, possibly the entertainment of a subordinate forest staff was not in contemplation when the Regulation was framed. However that may be it is clear that a Forest Guard since he is not appointed by the Chief Commissioner is not a Forest officer

6 In bye law VI of the Bye Laws there is a reference to "Forest officers not below the rank of jamadar" Now jamadar is not a technical rank in the Forest Department, but I am told it is used colloquially to describe a Forest Guard If so bye law VI is absurd since there is no one in the Department subordinate to a Forest Guard. The bye law does of course suggest that the framer of the Bye Laws supposed that employees of the Department other than those appointed by the Chief Commissioner were Forest officers But 'Forest officer" having been defined by Regulation I think that that definition must apply to any use of the expression in Bye Laws made under the Regulation

7 I allow the application, set aside the convictions and sentences and acquit the applicants The fines, if paid, should be refunded

Revision accepted.

BEFORE MR. D R. NORMAN, I C S

Chand Mal ... .. Accused—Applicant

Versus.

Crown ... Complainant—Opposite Party

Criminal Revision No 3 of 1939 decided on 30th March 1939 made by the Additional Sessions Judge Ajmer, by his order dated 18th January 1939, in Criminal Revision No 64 of 1938

(a) Motor Vehicles Act (VIII of 1914)—S 16 and Motor Vehicles Rules R. 40 and R. 23—If prosecution under R 40 vehicles should be examined by an officer with knowledge—Riding sufficient offence irrespective of ownership

If a breach of Rule 40 is alleged the cycle should, if possible, be examined by a police officer with some knowledge of motor cycles. [Para 6]

It is an offence to ride a motor vehicle without a silencer whether the rider owns the vehicle or not [Para 8]

(b) Motor Vehicles Act (VIII of 1914)—S. 16—Prosecutions must be lodged promptly

It is essential that prosecutions for motoring offences be lodged promptly otherwise the motorist may be unable to recollect what happened and to give his own explanation. [Para 7]

(c) Motor Vehicles Act (VIII of 1914)—S. 16—Imprisonment in lieu of fine can be inflicted

Imprisonment in default of fine can be legally awarded. [Para 9]

(d) Criminal Trial—Evidence—Appreciation

No fact material to the prosecution can be proved solely by a statement of the accused which the Court does not believe. [Para 10]

Mr *Kaushal Das Deedwania*—For the Applicant.

K. B *Abdul Wahid Khan*—For the Crown.

Order.—This is a reference from the learned Additional Sessions Judge recommending that a conviction be set aside The facts are that in the month of August 1937 Mr Beer (P. W 2), Deputy Superintendent of Police, was visiting his wife who was ill in the Victoria Hospital He noticed on two or three occasions that a motor bicycle was started from the porch with considerable noise He told police constable No. 65 (P W 1) who was on duty outside the Hospital to tell the rider not to start his machine near the porch According to police constable No 65 the rider complied with his direction on the first occasion but next day refused to do so and started his cycle from the porch

2. Police constable No 65 on the instructions of Mr Beer reported the matter His report is not on the record but there is a letter, Exh D 1, dated 21st August, from Sub-Inspector Matadin to Mr Beer which runs as follows .—

> "One Chandmal son of Nathmal Modi, owner of motor cycle No 1837/A M , was asked by constable Shamat Ali of Outpost Kaisarbagh not to bring his motor cycle inside the Hospital compound but he refused plainly The constable says that he was ordered by your honour to ask the owner"

The letter was sent through the Deputy Superintendent of Police (City) and Mr Beer replied by Exh P 1 dated 23rd August stating that he thought an offence had been committed under section 40 of the Motor Vehicles Rules (which provides that a motor vehicle must have a proper silencer) and asking that action be taken In result a charge sheet was filed in the City Magistrate's Court on 22nd October. The charge sheet is dated 9th October and states that the offence took place "1¾ months back" The offence is described as follows —

> "About 1¾ months back the accused created terrific noise by starting his motor cycle near patients' ward in Victoria Hospital It was annoying and disturbing patients and doctors. As the accused

committed breach of Rule 40 of Motor Vehicle Rules hence he is challaned under S 16th Motor Vehicle Act and submitted to Court

3 Stopping here I may remark that Rule 40 does not by itself create an offence. But Rule 23 provides that no person shall drive or have charge of a motor vehicle which does not comply with Rule 40 The charge therefore should have referred to Rule 23 as well as to section 16 and Rule 40

4 The accused denied visiting the Hospital during August and said he did not get a driving license until 31st August Evidence on his behalf was given by his cousin Noratmal (D W 1) Noratmal says that he had a motor cycle the number of which might be 1837, that he gave this cycle to accused after accused had obtained a license, that during July and August he (Noratmal) went once on it to the Hospital that he was asked by the constable on duty to start the cycle outside the Hospital and that after some argument he did so

5 The City Magistrate convicted the accused and fined him Rs 10/ Accused moved the Additional Sessions Judge who has made this reference on four grounds –

(1) That there had been no inspection of the bicycle to see whether the silencer was defective

(2) That accused had been prejudiced because the charge sheet did not give the date of the offence

(3) That it was not proved that accused owned the bicycle, and

(4) That imprisonment in default of fine could not legally be awarded

6 I agree with the learned Additional Sessions Judge that if a breach of Rule 40 is alleged, the cycle should if possible, be examined by a police officer with some knowledge

of motor cycles It even appears from the proceeding sheet that the prosecuting Inspector invited the attention of the police to this defect but no action was taken I should not however interfere on that ground if there were other reliable evidence Here there is not. Police constable No 65 says that when the cycle was driven to the Hospital the noise was ordinary Now even a quiet motor cycle makes a good deal of noise in starting Further, it is clear from Ex D 1 and from the original charge sheet that the real reason for the prosecution was that the cyclist refused to take the cycle outside the Hospital before starting it Now if a cycle does not comply with Rule 40 it is as much an offence to ride it along the road as to start it in the Hospital compound. As the police had apparently no objection to the cycle being started outside the Hospital it is a fair inference that its noise was not excessive This corroborates the statement of police constable No. 65 that when running its noise was ordinary

7 I also agree with the Additional Sessions Judge that the accused was prejudiced by the failure of the prosecution to state the day on which the offence was committed This omission is aggravated by the long delay, which is entirely unexplained, in lodging the prosecution It is essential that prosecutions for motoring offences be lodged promptly, otherwise the motorist may be unable to recollect what happened and to give his own explanation

8. The Additional Sessions Judge's third point is not good It is an offence to ride a motor vehicle without a silencer whether the rider owns the vehicle or not

9 The Additional Sessions Judge's fourth point is also not good, (See section 25 of the General Clauses Act and section 64 of the I P C)

10 There is one point which the Additional Sessions Judge has not referred to and that is the identity of the rider

of the offending cycle Police constable No 65 says that he did not know accused before the incident. He does not say that he asked accused for his name or took the number of the bicycle nor is it proved that cycle A M 1837 was registered in accused s name It is thus not obvious how the name of accused became known to the police. The City Magistrate held that police constable No 65 must have known accused since accused in his examination stated that police constable No 65 was hostile to him because he had refused him a loan This statement the City Magistrate disbelieved No fact material to the prosecution can be proved solely by a statement of the accused which the Court does not believe

11 I must also protest at the excessive delay in dispos ing of this case The charge sheet was returned for amend ment on 8th December and was not returned amended until 19th March Judgment was not pronounced until 3rd August. The revision application was filed in the Court of the Sessions Judge on 10th August but was not disposed of until 18th January

12 I accept the reference, set aside the conviction and sentence and acquit the accused The fine if paid, should be refunded.

13 A copy of this judgment should be sent to the Superintendent of Police

Conviction set aside

BEFORE MR D. R. NORMAN, I C S

Banshi Dhar . Complainant—Applicant

Versus

Mool Chand and *others* . Accused—Opposite Party

Criminal Reference No. 62 of 1938, decided on 14th March 1939, against the order, dated 8th July, passed by the Magistrate, First Class, Kekri, in Criminal Case No 56 of 1938

Criminal Procedure Code (V of 1898)—S.247—More than one complaint arising out of same set of facts—The singular Word "Complainant' includes all the "Complainants"—Notice of hearing must be given to all—Accused can be acquitted only if all complainants are absent

More than one complaint was made of offences arising out of the same set of facts under the Child Marriage Restraint Act One out of these cases was proceeded with The Complainant in that case was absent at the hearing The Mgistrate acquitted the accused. One of the remaining cases was next taken up The Accused contended that he had already been acquitted in the previous case on the same facts

Held, the word "complainant" in Section 247 will include all the persons who have made complaints, and notice of the date of hearing must be given to them all It is only when all the complainants are absent that the accused can be acquitted [para 2]

Mr *Akshai Singh Dangi*—For the Applicant

Mr *Jawand Lal Datt Choudhary*—For the Accused

Order.—This is a reference from the learned Additional Sessions Judge arising out of the acquittals of the two opponents for offences under the Child Marriage Restraint Act The facts are that three separate complaints were made in respect of the same marriage, by Ram Pertap on 7th May, by Bansi Dhar on 16th May and by Gir Raj on 3rd June 1938 In each case the same facts were alleged, but Gir Raj's complaint implicated four other persons besides the opponents The Magistrate (the Sub Divisional Officer, Kekri) decided to hear Gir Raj's complaint first. Before the

hearing Bansi Dhar asked the Magistrate to take his own complaint first all alleging that the complaints of Gir Raj and Ram Pertap were collusive The Magistrate took no notice of this, and on the day of the trial in Gir Raj's complaint, namely 17th June, Gir Raj was absent The Magistrate therefore acquitted all the accused under section 247 Cr P C Bansi Dhar was present in Court and on the acquittal asked that his own complaint should be taken up The Magistrate fixed a date for hearing At the hearing the opponents contended that they had already been acquitted of the offence disclosed by Bansi Dhar's complaint. The Magistrate accepted this argument and acquitted them Bansi Dhar went to the Additional Sessions Judge in revision and the Additional Sessions Judge held that, although the acquittal in the trial arising out of Gir Raj's complaint was a bar to a further trial for offences under sections 5 and 6 of the Act yet, as Bansi Dhar's complaint also disclosed an offence under section 12 of the Act, the order of acquittal ought to be set aside to that extent Accordingly he has made this reference

2 In my view both the acquittals ought to he set aside Under section 247 Cr P C the accused is entitled to an acquittal when the complainant does not appear Now the singular ordinarily includes the plural and it may happen as it has happened here that more than one complaint is made of an offence arising out of the same set of facts When that is so the word "complainant in section 247 will include all the persons who have made complaints and notice of the date of hearing must be given to them all It is only when all the complainants are absent that the accused can be acquitted under section 247 Cr P C If this were not so it would always be possible for the accused in a summons case to stifle the prosecution by putting up a dummy complainant who would conveniently remain absent at the date of the trial It follows therefore that the acquittals of the opponents must be set aside in both trials i e that arising out of Gir

Raj's complaint and that arising out of Bansi Dhar's complaint On the same ground the acquittal of the four other persons in the trial arising out of Gir Raj's complaint is liable to be set aside But as I do not think that on the facts there is any case against them I allow their acquittals to stand.

3. It is then contended on behalf of the opponents that there has been no proper verification of Bansi Dhar's complaint, and no proper enquiry under section 202 Cr P C An enquiry under section 202 Cr P C is, in cases under the Child Marriage Restraint Act, made compulsory by section 10 thereof This allegation seems to me to be correct There is a verification of the complaint taken on 17th May, but it is in Urdu and is not signed by the Magistrate There are also statements of witnesses in Urdu taken on the same day but they are also unsigned by the Magistrate No order was passed by the Magistrate uptil 17th June when the Magistrate directed that Bansi Dhar's complaint should be taken up But in the order of that date there is no reference to the preliminary enquiry. It therefore looks very much as if the verification and the enquiry had been conducted by a clerk and not by the Magistrate himself The practice of deputing verification and enquiry to a clerk is entirely illegal, and I have several times condemned it There must be a proper verification and enquiry before the trial takes place

4. I set aside the acquittals of the opponents Mulchand and Bansi Dhar in criminal cases 52 of 1938 (Gir Raj's complaint) and 56 of 1938 (Bansi Dhar's complaint) The Magistrate will verify Bansi Dhar's complaint and will hold the preliminary enquiry requied by section 10 of the Act He will then, if he considers that a prima facie case has been made out, proceed to try it Notice of the date of hearing should be given to the other complainants Gir Raj and Ram Pertap.

Acquittals set aside.

BEFORE MR D R NORMAN, I C S

Mool Chand Decree Holder—Applicant

Versus.

R S Munshi Durga Pershad and *others* .. Judgment debtors—Opposite Party

Civil Revision Application No 15 of 1938 decided on 14th March 1939 against the order dated 29th October 1937 passed by the Sub Judge First Class Kekri in Civil Execution Case No 3 of 1936

Civil Procedure Code (V of 1908)—S 60—Materials of the houses in Istimrari estates are attachable

Though the occupant of a house in an Istimrari Estate can be evicted at any time by the Istimrardar he is entitled to remove the materials of the house and had to that an extent an attachable and saleable interest in the house *C R A 97 of 1931* Foll. [Para 1]

Practice—Circulars—Circular of Registrar (under Registration Act) not binding on Civil Courts.

No circular of the Assistant Commissioner in his capacity of Registrar is binding on a Civil Court. [Para 2]

Mr *Guman Mal Chandak*—For the Applicant

Nemo—For Opposite party

Order—Applicant in execution of a decree sought to attach his judgment-debtor s house situated in an Istimrari Estate The Istimrardar through his Manager (opponent No 1) applied to have the attachment removed on the ground that houses in Istimrari Estates *are not attachable* Now this is a point of law which has already been settled by the decision of this Court in *Chand Mal* v *Mst Hagami*[1] in which Jolly J C held that though the occupant of a house in an Istimrari Estate could be evicted at any time by the Istimrardar, he was entitled to remove the materials of the

1 C R. A. No 97 of 1931

house and had to that an extent an attachable and saleable interest in the house The Subordinate Judge, Kekri, Mr Abdul Majid, was aware of this ruling But he was also aware of a circular No 1312 of 1892 issued by the Assistant Commissioner and Registrar stating that lands and buildings in Istimrari Estates could not be mortgaged or sold and directing Sub Registrars to refuse registration of such alienations Instead of deciding for himself whether he should follow the ruling of this Court or the Registrar's circular the Judge adopted the entirely improper course of writing to the Assistant Commissioner and Registrar asking what he should do in the matter The answer received is not on the record In result however the Judge removed the attachment relying on the circular No 1312 His judgment does not refer to the decision in *Chand Mal* v *Mst Hagami* [1]

2 Apart from the means by which it was arrived at the Judge's decision is incorrect No circular of the Assistant Commissioner in his capacity of Registrar is binding on a Civil Court, whatever may be its authority over the Judge in his capacity of Sub Registrar The law has been explained by this Court in *Chand Mal* v *Mst Hagami*[1] and that authority is binding on all Civil Courts in Ajmer-Merwara.

3 I allow the application, set aside the order of the trial Court removing the attachment and restore the attachment Opponent No 1 must pay applicant's costs in this Court

Application allowed.

BEFORE MR D R NORMAN I C S

Champa Lal .. .. Applicant.

Versus

Kedar Mal and *others* .. Opposite party

Small Cause Court Revision No 46 of 1938 decided on 30th March 1939 against the order dated 31st January 1939 passed by Judge Small Cause Court, Beawar in Small Cause Court Execution Cause No 895 of 1937

(a) Civil Procedure Code (V of 1908)—O 20, R 11 (2)—Application can be made only to the Court passing the decree :

An application under Order 20 Rule 11 (2) must be made to the Court which passed the decree and section 42 C P C. does not confer concurrent powers on the Court executing the decree, *54 Allahabad 573* 12 *Rangoon 320* 1921 *Patna 340* 11 *Patna 580* Foll *22 Calcutta 558 and 1931 Allahabad 320* (2) Dist. *43 Allahabad 394* Not Foll [Para 3]

(b) Civil Procedure Code (V of 1908)—S 38 and O 21, R. 11 (2)—Irregularity or want of jurisdiction—If Executing Court passes order it acts without jurisdiction. The order is a nullity—Acquiescence of no avail

The Civil Procedure Code draws a clear distinction between the proceedings which lead up to a decree i e the suit, and the proceedings which result in the execution thereof If the Executing Court passes an order altering the terms of the decree to be executed then it is usurping the jurisdiction of the trying Court and unless that power is expressly vested in it, it is acting without jurisdiction and the acquiescence of the judgment debtor will not avail the Decree Holder and he cannot execute the amended decree, *1928 P C 162 and 16 Lah 63* Dist.

Mr Jyoti Sarup Gupta—For the Applicant.
Messrs Nathu Lal Ghiya and Jagan Nath Sharma—For the Opposite party

Order—Applicant obtained a decree against opponent No 1 in the Court of Small Causes, Nasirabad and got it transferred for execution to the Court of the Subordinate Judge, Beawar Applicant and opponent No 1 then put in

a joint application in the Beawar Court under Order 20, Rule 11 (2) for an order that the decree should be payable by instalments, and opponent No. 2 signed the application as surety for payment of the decretal amount The Court allowed the application and ordered the decree to be amended The present application arises out of a darkhast to execute the decree as amended. The trial Court dismissed it holding that as a party cannot be added by a compromise in a suit he cannot be added in execution of a decree and further that the executing Court had no power to amend the decree

2. On the first point the trial Court is clearly wrong. Order 20, Rule 11 (2) expressly authorises the taking of security from a judgment debtor when an order for instalments is made

3 The question whether the executing Court can make an order under Order 20, Rule 11 (2) is not quite so simple The word used in the Rule is "the Court". But the Order is entitled "Judgment & decree" and in all other Rules under that Order including Rule 11 (1) the expression "Court" means the Court passing the decree If therefore it was intended to give concurrent powers under Sub Rule (2) to a Court executing a decree one would have expected this to be made clear. Further, such authority as there is on the interpretation of "Court" in Sub Rule (2) supports the trial Judge's view See *Gordhan Das* v. *Dan Dayal*[1] *O. R. M. M S P S. V. Chettyar Firm* v *K. P. P. Narayanan Chettyar*[2]. *Gobardhan Pershad* v *Bishnunath Prasad*[3]. To this Mr. Gupta for applicant replies that, granted that, the power to make an order under Rule 11 (2) is primarily vested in the Court which passed the decree yet Section 42 of the Code gives the Court executing the decree concurrent jurisdiction, and he refers to certain cases in which it has been held that, even when power to do a certain act has been

1 I L. R 54 A 573 2 I L R 12 R 320=1934 R 165. 3. A I R 1921 P 340

specifically vested in the Court which passed the decree, yet the Court executing the decree has concurrent powers. Of these cases *Sham Lal Pal* v *Modhu Sudan Sircar*[4] and *S Marahmat Husain* v *Oudh Commercial Bank Ltd*[5] deal with the power of the Court to order execution against legal representatives, a power which the Court which passed the decree exercises under section 50, and *Sital Prasad* v *Messrs Clement Robson and Company*[6] deals with the power of the Court to grant execution against a partner who has not appeared in a suit in his own name, a power that the Court which passed the decree exercises under Order 21 Rule 50 (2) *Sham Lal Pal* v *Modhu Sudan Sircar*[4] however is not really in point since it was there held that the executing Court had concurrent powers under Order 21 Rules 22 and 23 The two Allahabad decisions are however based on section 42 But section 42 only gives powers to the executing Court "in executing such decree, and though the substitution of legal representatives may he considered a matter which arises in execution it is difficult to say that an order for instalments, which alters the terms of the decree to be executed, is an order in execution The power of a Court under Order 21 Rule 50 (2) certainly bears a closer analogy to the power of a Court under Rule 11(2) But *Sital Prasad* v *Messrs Clement Robson and Company*[6] was expressly dissented from *Kalu Ram* v *Firm Sheonand Rai Jokhi Ram*[7] on the ground that an order under O 21 Rule 50 (2) could not be said to he made in execution, and with all due respect the Patna view on this point seems to me the correct one It is worth noticing that the argument now adduced by Mr Gupta was not advanced in any of the cases under Rule 11 (2) although one of them was a decision of the Allahabad High Court. In my Judgment therefore an application under Order 20 Rule 11 (2) must be made to the Court which

4 A I R 22 C. 558. 5 A I. R 1931 All. 320 (2) 6. I L. R. 43 A. 394
7 I L. R. 11 P 589.

passed the decree and section 42 does not confer concurrent powers on the Court executing the decree.

4. Lastly Mr. Gupta argues that whether the order is made by the Court which passed or by the Court which executes the decree is a question of procedure only, and that an irregularity in procedure is cured by acquiescence therein. In support of this he cites (*Kunwar*) *Jang Bahadur* v *Bank of Upper India Ltd* [8] *and Moti Ram Diwan Chand through Beli Ram* v. *Dhanna Singh-Haveli Ram* [9] In the former case leave to execute against legal representatives had been asked from the executing Court, in the latter leave to execute by an assignee had been asked from the executing Court In both cases it was held that though the leave should have been asked from the Court which passed the decree the omission to do so was an irregularity in procedure only and that, as several steps in execution had taken place without any objection being made, the irregularity was cured by acquiescence In the Privy Council decision it was pointed out that there was a difference between irregular procedure which could be cured by acquiescence and a want of jurisdiction which could not The question therefore here is whether the executing Court acted without jurisdiction in amending the decree. I hold, though with some hesitation, that it did The right of an assignee to execute a decree, and the right of a decree holder to get the legal representatives of the judgment debtor brought on the record is undisputed, and the proper method of bringing the assignee or the legal representatives on the record of the execution proceedings may be said to be a point of procedure But the Code draws a clear distinction between the proceeding which lead up to a decree, i e the suit, and the proceedings which result in the execution thereof If the executing Court

8 A I R 1928 P C 162 9 I L R 16 L 63,

passes an order altering the terms of the decree to be executed then it is in my judgment, usurping the jurisdiction of the trying Court, and, unless that power is expressly vested in it, is acting without jurisdiction Therefore the acquiescence of the judgment debtor will not avail the decree holder and he cannot execute the amended decree

5 In this view of the law applicant cannot proceed against the surety But I do not see why he should not be allowed to execute the original decree against the judgment debtor It is suggested that his darkhast would be time barred as the previous darkhast which keeps execution alive was to execute the amended decree Primarily however the darkhast was to execute the decree which the decree holder had obtained in a particular civil suit and if the amendment was without jurisdiction then the application must be regarded for purposes of limitation as if it had been to execute the unamended decree

6 I therefore set aside the order of the trial Court in so far as it dismisses the darkhast as against the judgment debtor Kedarmal and direct that execution do proceed against Kedarmal Looking to all the circumstances I make no order for costs

Order set aside

6. Advocates and Pleaders.

Notification No 33-57/J. VII—38, dated the 12th January 1939, issued by the Judicial Commissioner, Ajmer-Merwara.

I LIST OF ADVOCATES.

1	Mr	Govind Prasad Mathur	Bar-at-law
2	S B	Bhagwan Singh	Bar-at-law
3	[1]Mr	Bishamber Nath	B A, LL B
4	R B	Mithan Lal Bhargava	B A, LL B
5	Mr	Sukhdeo Prasad Udawat	M A, Bar-at-law
6	[2] ,,	Brij Nath Tandon	Bar-at-law
7	,,	Raghu Nath Agarwal	B. A, LL B
8	,,	Abdul Rashid	B A, LL B
9	K. B	Abdul Wahid Khan	B A, LL B
10	Mr	Ghisoo Lal	M. A, LL B
11	,,	Parmatma Swarup	B Sc, LL B
12	,,	Anandi Prasad Bhargava	B A, LL B
13	,,	Daya Shankar Bhargava	B A, LL B
14.	,,	Madan Mohan Kaul	B A, LL B
15	,,	Hem Chandra Sogani	B Sc., LL B
16	,,	Swarup Narain Agarwal	B A, LL B.
17	,,	Lekh Ram Angirish	B A, LL B.
18	,, (*a*)	Brahma Datta Bhargava	B A, LL B.
19	,, (*b*)	Kaushal Kishore Bhargava	B A, LL B
20	,,	[3]Mahadeo Prasad Bhargava	Bar-at-law
21	,,	Chand Karan Sarda	B A, LL B
22	,,	Syed Abdul Quddoos	M A, LL B
23	,, (*c*)	Narain Prasad Asthana	
24	,, (*c*)	Rajendra Nath Mukerjee	
25	,,	Jyoti Swarup Gupta	B A, LL B
26	,, (*c*)	C F Ball	Bar-at-law
27	,, (*c*)	V G Bapat	B A, LL B
28	,, (*c*)	Shiv Narain	B. A, LL B
29	[2] ,,	Brian Edward O'Conor	B A, LL B
30	,, (*c*)	T A Bradley	Bar at-law,
31	,, (*c*)	V G Dalvi	Bar-at-law
32	,, (*c*)	Ram Kishen Singh Toshniwal	

Note by the Editor, A M L J to the best of his information

(1) Rai Sahib (2) Died (3) Died on September 11, 1939

(*a*) In service, (*b*) ordinarily practising at Beawar, (*c*) ordinarily practising at Nasirabad, (*d*) ordinarily practising at Kekri, (*e*) ordinarily practising outside Ajmer-Merwara.

33	Mr (*d*)Shiv Sahai Verman	B A., LL B
34	(*b*) Nathu Lal Ghiya	B A., LL B
35	Sri Lal Agarwal	B A. LL B
36	(*a*) Radhey Lal Jaiswal	B A LL. B
37	Kaushal Das Deedwania	B A., LL. B
38	(*a*) Ganga Prasad Dube	M A., LL. B
39	(*b*) Kanhaiyalal Verma	B A., LL B
40	Javand Lal Dutt	M A., LL. B
41	(*b*) Moti Prasad Mehta	B A. LL B
42.	Ballabh Das Khanna	B A., LL. B
43	(*a*) Nand Lal Mehta	B A., LL. B
44	(*a*) Moti Lal Agarwal	B A., LL. B
45	Abdul Qadir Beg	M A., LL B
46	(*c*) Radha Mohan Toshniwal	B Sc., LL. B
47	Bishamber Nath	B A., LL. B
48	Shyam Swarup	B A., LL. B
49	„ Milap Chand Chhabra	B Sc. LL. B
50	Chunni Lal Agarwal	B Sc., LL. B.
51	(*a*) Gajendra Nath	B Sc., LL. B
52	„ Mukat Behari Lal	M A., LL. B
53	(*c*) Ram Chandra Arun	B. A., LL. B
54	(*b*) Shiam Sunder Lal	B Sc. LL B
55	(*c*) Hira Lal Jain	M A., LL. B
56	„ Motilal Malaywar	B A., LL B
57	(*b*) Jagan Nath Sharma	B Sc., LL. B
58	„ (*a*) Moinuddin Qureshi	B A., LL. B
59	Kishen Lal Sankla	B A., LL. B
60	Raj Narain Mathur	B A., LL. B
61	„ Shri Krishan Agarwal	B Sc., LL. B
62	Shiam Sunder	B A., LL. B
63	Christopher Jacob	B A., LL. B
64	Basanti Lal Maheshwari	B A. LL. B
65	Debi Narain Simlote	B Sc., LL. B.
66	Akshal Singh Dangi	M A., LL. B
67	„ (*a*) Manohar Lal Udawat	B A LL B
68	Debi Dayal Bhargava	B Sc., LL. B
69	Shri Kishan Jindal	B. A LL. B
70	(*b*) Mahesh Datt Bhargava	B A., LL. B
71	„ Birdhi Chand Lakhotia	B Sc. LL. B
72.	Sachchida Nand Bhargava	B. A., LL. B
73	„ Shamsul Ghani Khan	B A., LL. B

74.	,,	Hafiz Mohammed Bux	Bar-at-law.
75	,,	Rikhab Chand Jain	M A, LL B
76	,,	Panna Lal Agarwal	B A, LL B
77.	,,	Som Datt Bhargava	B Sc, LL B
78.	,,	Guman Mal Chandak .	B Sc, LL B
79.	,,	Krishna Verma	M A, LL. B.

II LIST OF PLEADERS

1	Mr (*b*)	Gulam Hussain Khan	B A, LL B
2	,,	Bishamber Nath .	B A, LL B
3	,, (*d*)	Ram Niwas Agarwal .	B Sc, LL B
4	,, (*a*)	Ratan Lal Dani .	B A, LL. B.
5	,,	Triloki Nath Bhargava	B A, LL B
6	,, (*b*)	Govind Narain Mathur .	B A, LL B
7.	,,	Albert Livingston David .	B A, LL B
8	,, (*a*)	Nand Lal Mathur .	B Sc, LL B
9	,,	Umrao Mal Dhaddha	B A, LL B
10	,,	Dattatraya B Vable	M A, LL. B
11	,,	Bhagwati Prasad Heda	B A, LL B
12.	,,	Jagdish Narain Mehra	B A, LL B
13.	,,	Santosh Kumar Dey Biswas	B A, LL B
14	,	Seeta Ram Gupta	B A, LL B.
15.	,, (*a*)	Damodar Lal Khandelwal	B A, LL B
16	,,	Mohamed Khalil Khan Ghory . .	M Sc, LL B
17.	,,	Guman Mal Dosi	B A, LL B
18	,,	Shiam Sunder Deedwania	B Sc, LL B
19	,, (*c*)	Hari Datt Ubana .	B A, LL. B
20	,, (*d*)	Syed Abdoz Zahur	B A, LL B
21	,,	Vishwanath Vinayak Halwe	B A, LL B
22	,,	Brij Krishna Das Badgel	B A, LL B
23.	,,	Krishna Gopal Shrivastava	B A, LL B
24	,,	Panchoolal Dosi	B A, LL B
25	,,	Ram Chandra Simlote .	B A, LL B
26	,,	Madan Singh	B A, LL B
27	,,	Suraj Prasad Mathur	B Sc, LL B
28.	,, (*c*)	A H Noor Ahmed	B A, LL B.
29	,, (*b*)	Krishna Chandra Gupta	B A, LL. B
30	,,	Krishna Gopal Sharma	B A, LL B
31	,,	Suresh Chandra Mehrash	B A, LL B
32.	,,	Amar Chand Maheshwari ...	M Sc, LL B.

Ajmer

1 Mr Govind Prasad Mathur, Advocate
2 Sardar Bahadur Bhagwan Singh Advocate
3 Rai Bahadur Mithan Lal Bhargava, Advocate
4 Mr Sukhdeo Prasad Advocate
5 Mr Raghu Nath Agarwal Advocate.
6 Khan Bahadur Abdul Wahid Khan Advocate.
7 Mr Abdul Rashid Advocate.
8 Ghisu Lal Dhanopia, Advocate
9 Parmatma Swarup Advocate
10 Anandi Prasad Bhargava Advocate
11 Madan Mohan Kaul Advocate.
12 Daya Shankar Bhargava Advocate
13 „ Hem Chandra Sogani Advocate.
14 Swarup Narain Agarwal Advocate
15 Lekh Ram Advocate
16 Chand Karan Sarda, Advocate
17 *Jyoti Swaroop Gupta Advocate*
18 „ Shri Lal Agarwal Advocate
19 Kaushal Dass Deedwania, Advocate
20 Javand Lal Dutt Choudhary Advocate
21 Ballabh Das Khanna, Advocate
22 Mirza Abdul Qadir Beg Advocate

Beawar

1 Pt Jagan Nath Sharma, Advocate
2 Mr Kanhaiya Lal Varma, Advocate
3 Kaushal Kishore Bhargava, Advocate.
4 Moti Prasad Mehra, Advocate
5 Pt. Mukat Behari Lal Bhargava Advocate.
6 Mr Nathu Lal Ghiya, Advocate
7 Shiam Sunder Lal Agarwal Advocate.

Kekri

1 Mr Shive Sahey Verma, Advocate.

Nasirabad

1 Mr Hira Lal Jain, Advocate
2 Ram Chandra Aiman, Advocate

No advocate should undertake to train more than 2 candidates at the same time without the written permission of the Judicial Commissioner

10. Touts.

Order No 3-9-54-78/IV (J)-23 dated the 25th July 1939, issued by Rai Bahadur Shiv Charan Das District and Sessions Judge, Ajmer-Merwara and Mr B J K Hallowes, District Magistrate, Ajmer-Merwara

The persons whose names appear in the enclosed list of touts framed by the District Magistrate under rule 23 of Judicial Commissioner's order No 246/J-IV(a) dated the 21st February 1935, are hereby precluded from entering the precincts of the Courts in Ajmer-Merwara except on their personal business

REVISED LIST OF TOUTS IN AJMER

1 Mohammed Ali son of Mir Ghafoor Ali, Mohalla Imambara, Ajmer.

2 Jahangir Khan son of Nabi Mohammed Khan, Mohalla Khadiman, Chah Rahat, Ajmer

3 Mukhtar Ali son of Ghulam Ali, Mohalla Attka Kunwan near Mohalla Khadman, Ajmer

4. Nathe Khan son of Qutub Khan, Purani Mandi Ajmer

5 Chotey Lal Kayasth son of Raj Kunwar, Mohalla Hathi Bhata, Ajmer

6 Chintaman Mahajan Lakhan Kothri Ajmer.

7 Mool Chand Mahajan of Kanpura

8 Kanhiyalal son of Mool Chand Koli of Nagra, Ajmer

9 Ghulam Rasul son of Nianiat Ali of Ajmer

10 Iqbal Husain son of Nawab Ali of Idgah, Ajmer

11 Abdul Aziz of Ajmer

12 Usman Khan son of Munir Khan of Ajmer.

13 Rora Rawat of Khwajpura

14 Kalyan Mal son of Bal Mukand Mahajan of Tabiji.

15 Bhura son of Misri Khan of Bargaon.

16 Modu Lal son of Gulab Chand Mahajan, near Agra gate, Ajmer

17 Malla Chita of Somalpura

18 Abdul Ghafoor Alias Ghafoor Khan of Ajmer

19 Wazir Ali son of Wajid Ali Khadim Ajmer.

11. Bona Fide Residents.*

At its Annual General meeting held on August 26 1939 the Bar Association Ajmer resolved to amend Rule 46 of its rules as under*

(i) In clause (a) the figure 5 be changed into 10

(ii) In clause (b) the words prior to be deleted and the word preceding be substituted

---

12. District Judge

Notification No 194/37 Judcl dated the 27th April 1939 by the Government of India Home Department

In exercise of the powers conferred by section 4 and sub section (2) of section 28 of the Ajmer Courts Regulation 1926 (IX of 1926) the Central Government is pleased to appoint Rai Bahadur Shiv Charan Das, Barrister at Law Additional District and Sessions Judge Ajmer Merwara, to be also the District & Sessions Judge, Ajmer Merwara until further orders

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The Rule is published at Page 12 of 1937 Ajmer Merwara Law Journal—Notification Section—Ed A M L.

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THE
AJMER-MERWARA
LAW JOURNAL.

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Cases determined by the Court of Judicial Commissioner, Ajmer Merwara and important Notifications applicable to Ajmer Merwara

Editor.

JYOTI SWARUP GUPTA,
Advocate, High Court,
AJMER.

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Suit lies on Khata Baqi

We invite the attention of our readers to an exhaustive judgment pronounced by the Judicial Commissioner on October 11 1939 in

S C C Revision No 66 of 1939; Ratan Lal v Rajmal

The suit was based on Khata Baqi the Khata Baqi may be described as a document in which the defendant admitted that the suit amount remained to be paid by him to the plaintiff

It has been held that the word promise in S 25 (3) of the Contract Act read with S 9 of the Contract Act includes both an express as well as implied promise and therefore a suit can be based on an unqualified admission of debt

Ed A M L J

The Ajmer-Merwara Law Journal, 1939 Part III

Alphabetical Index of cases Reported

The Ajmer-Merwara Law Journal.
1939-Part III.

SUBJECT INDEX.

Criminal Procedure Code (V of 1898) *Contd*

—S 188—Accused was living in British India—He arranged in British India for the marriage of his minor child to take place out of British India—No certificate necessary as offence committed in British India 120

—S 205—*Pardanashin lady*—Dispensation to appear—Power to be liberally exercised 139

Government of India Act (1935):

—S. the High Court is given general powers of superintendence over inferior courts. 114

Hindu Law:

—*Joint Family*—*Manager*—Suit by—Manager must sue on behalf of—If record shows that he is manager he need not subscribe himself as such 112

Interpretation of Statute:

—*Wording clear*—Intention to be deduced from the wording 132

Practice:

—*Duty of Court*—Courts must be particularly attentive to see that documents are properly stamped before they are admitted in evidence 125

Registration Act (XVI of 1908):

—S 82 and S 83- Offence under S 82 coming to knowledge of Revenue officer who refers to Police—Police prosecuter—No permission of Registration department necessary 132

Specific Relief Act (I of 1877):

—S. 42—One joint owner suing the other—Suit for injunction sufficient 120

—S. 42 (Expl.)— Able means ought 120

Stamp Act (II of 1899):

—S 4, S 5, Art 13 (b) and Art 49—A balance executed by the defendant in the defendants account contained a stipulation about instalments and rate of interest. *Held* it was a promissory note and not an agreement—Further if it does not bear the requisite stamp no penalty can be levied and it is not admissible in evidence 125

—S 36—Document admitted in trial Court—Admissibility cannot be questioned in Appeal or Revision 125

—S. 61—High Court cannot refund excessive stamp duty where it has been wrongly levied in the lower Court. 125

BEFORE MR. R. W. H DAVIES.

Beni Prasad, Pt .... .. Plaintiff-Appellant.

Versus.

Bashiran, Mst. and *others* ... Respondents-Defendants

Civil First Appeal No 10 of 1939, decided on 19th July 1939, arising out of the order and decree, dated 27th January 1939, passed by the Sub Judge, First Class, Ajmer, in Civil Suit No. 298 of 1935 and in Misc Case No 21 of 1937

C. P. C. (V of 1908)—O. I, R. 6 & O 22, R. 4—Defendants held jointly and severally liable—One Defendant died—His Legal Representative not brought on record—Suit can proceed against remaining Defendants

A decree was passed making all Defendants, jointly and severally, liable for the amount One of these defendants died and his Legal Representative was not brought on the record The trial court held that this release of one of the defendants operated to abate the suit against all *Held*, the proceedings may still go on against the remaining Defendants

Mr *Kaushal Das Deedwania*—For Appellant

Mr *Abdul Rashid*—For Respondents 3 to 4.

Judgment.—In this first appeal from the decree of the First Class Subordinate Judge, Ajmer, the facts are extremely simple In an execution application property was sold which proved insufficient to defray the amount of the debt Further proceedings were taken against the defendants and a decree was passed making all five of them jointly and severally liable for the amount One of these defendants died and his legal representative was not brought on the record The learned Sub Judge held that this release of one of the defendants operated to abate the suit as against all This is not the correct view in Indian law though it is so in English law The proceedings may still go on as against the other four defendants.

2 I therefore set aside the decree of the lower Court so far as the order of abatement is concerned A decree should therefore issue in favour of the appellant as against the four remaining defendants with future interest at 6 per cent from the date of the institution of the suit until realisation together with costs in both Courts

Appeal allowed

BEFORE MR R W H DAVIES

Hazari Appellant

Versus.

Partaba and *others* Defendants

Civil Appeal No 22 of 1939 decided on 1 t August 1939 arising out of the order passed by the Addtional Distric Judge Ajmer on 31st January 1939 in Civil appeal No 54 of 1935

C. P C. (V of 1908)—S 151 & O 43, R. 1 (u)—Remand under Court inherent powers—No appeal

There is no provision for an appeal where a suit has been remanded under the inherent powers of the Court [Para 3]

Mr *Daya Shanker Bhargava*—For the appellant.

Mr *Govind Prasad Mathur*—For the Respondents

Judgment —This is an appeal from an order of the learned Second Additional District Judge delivered in appeal against an order of the Sub Judge Ajmer It purports to be under the provisions of Order 43, Rule 1 (u) That paragraph in its turn alludes to Order 41 Rule 23

2 A preliminary objection was raised to the hearing of this appeal on the ground that no appeal lay in the circumstances of the present case. I am of opinion that objection is correct and this appeal must accordingly be dismissed with costs

3 The facts of the case are that the plaintiff sued the defendant in the lower Court for a perpetual injunction restraining him from disturbing the plaintiff in his enjoyment of the suit property and for a declaration that the suit sale deed was null and void As regards the declaration the trial Court has held that the sale deed was null and void and that the plaintiff was the owner of the property It further held that the plaintiff was in possession and it therefore granted an injunction restraining the defendant from interfering The lower appellate Court has found that plaintiff was not in possession of the property and has remanded the suit with a direction that the plaint be amended That of course was not the best procedure. The learned Judge could have decided on the merits whether in fact the sale deed was null and void and whether plaintiff had proved his title If so the plaint might have been amended in the appellate Court and possession granted If not the suit could have been dismissed Instead he has, as I have already stated, not heard the appeal on the declaration and remanded the case with permission to amend the plaint. These facts do not however at present concern this Court. The suit has been remanded as already indicated. Under Order 43, Rule 1 (u) an appeal only lies where a case has been remanded under Rule 23, Order 41 Rule 23 relates to a remand where the lower Court has disposed of the suit upon a preliminary point That is not the case here The suit here was disposed of in its entirety on the merits Moreover it was also not remanded under the provisions of Order 25 There remains only section 151 C P C under the provisions of which this suit could have been remanded The Civil Procedure Code makes no provisions for an appeal where a suit has been remanded under the inherent powers of the Court and it is therefore clear that no appeal can lie in the present case. As already indicated therefore this suit must be dismissed with costs.

Appeal dismissed.

BEFORE MR R W H DAVIES.

Gopal .. .. Applicant.

Versus

Kanu Ram .. .. Opposite Party

S C. C Revision No 47 of 1939 decided on 31st July 1939 arising out of the judgment passed by the Judge, Small Cause Court Ajmer on 11th April 1939 in suit No. 915 of 1938

C. P C. (V of 1908)—O 6, R 17—Amendment—Without notice to opposite party—Improper

The plaint was returned for amendment and amended without notice to the defendant The amendments made were all important The order was set aside

Messrs. *Jawand Lal Dutta Choudhary & Krishna Varma*—For the applicant.

Mr *Kaushal Dass Deedwania*—For the Opposite Party

Order—I think this case must be remanded The plaint was returned for amendment and amended without notice to the defendant The amendments made were all important I set aside the order of the trial Court and remand the case for disposal of the suit on the plaint as brought in the first instance Costs of this hearing to be costs in the cause

Case Remanded

BEFORE MR R W H DAVIES

Chand Mal and *Others* .. Plaintiffs Applicants.

Versus

Chouth Mal and *Others* Defendants Opposite Parties

S C C Revision No 25 of 1939 decided on 24th July 1939 arising out of the judgment dated 9th December 1938 passed by the Judge, Small Cause Court, Beawar in S. C. C Suit No 145 of

Hindu Law—Joint Family—Manager—Suit by—Manager may sue on behalf of—If record show that he is manager he need not subscribe himself as such

A Hindu Manager may sue on behalf of the joint family and if it clearly appears from the record that he is the manager of the joint family then it is not necessary for him to subscribe himself as such when acting as a party to a proceeding in Court [Para 4]

Mr *Moti Prasad Mehra*—For the Applicants

Mr *Jawand Lal Dutta Chowdhary*—For the Opposite Parties

Judgment —This is a revision application under the provisions of section 25 of the Provincial Small Cause Court Act

2 Two questions were raised in the application —

(1) Whether Exh P. 1 has merged into Exh D. 1 ?

(2) Whether the suit fails under the provisions of the Limitation Act ?

3 On the first point the evidence is very scanty. The plaintiff alleges that there was no merger and the defendant that there was a merger The learned Small Cause Court Judge has held for the defendant I find it difficult to understand why Exh P 1 was not destroyed if it was merged into Exh D 1 But there being evidence on the record both ways I do not think that I should interfere with the decision in this respect

4 On the second point I disagree with the learned Judge, Small Cause Court In this case the plaintiffs were members of a joint Hindu family which consisted of one major and three minors Later it is was sought to add a fourth minor on the ground that he was a member of the joint family The defendant urged that he was a necessary party and that as the period of limitation had run out the suit must fail. In my opinion he was not a necessary party. It is settled law that a Hindu Manager may sue on behalf of the joint family and it is further now generally agreed that if

it clearly appears from the record that he is the manager of the joint family then it is not necessary for him to subscribe himself as such when acting as a party to a proceeding in Court In the present case as he is the only major plaintiff it is abundantly obvious that he is the manager of the joint family and therefore it was not necessary in the first place to join the three minor plaintiffs That being the case the fourth minor plaintiff is certainly also not a necessary party

5 The result is that the suit is correct as first framed and the point of limitation fails The plaintiff instituted this action to recover on the basis of Exh P 1 He is therefore non suited and the rule discharged. He may, if so advised, bring another suit on the basis of Exh D 1 No order as to costs

Rule discharged

BEFORE MR I. W H DAVIES

Ale Rasul Ali Khan Dewan Syed ... Applicant

Versus

Bal Kishan Seth Opposite Party

Civil Application No 69 of 1939 decided on 26th July 1939 for transfer of the suit

C. P C. (V of 1908)—S 24—District Judge rejected the application—Further application can be entertained by the High Court; Government of India Act (1935)—S

If an application for transfer is rejected by the District Court a further application can be entertained by the High Court.

The High Court is given general powers of superintendence over inferior Courts, and the powers given by the section are not exactly parallel in the case of both the Courts. [Para 1]

Mr. *Abdul Qadir Beg*—For the Applicant
Mr *Ghasi Lal Dhanopia*—For the Opposite Party

Order.—This is an application for transfer under section 24 of the C. P. C An application was previously made to the District Judge who by his order dated 26th April 1939 dismissed the application In a further application now made to this Court the question arises whether, as concurrent jurisdiction is given to the two Courts, when an application has been rejected by the District Court, a further application cannot be entertained by the High Court. I find that it can be so entertained. The High Court is given general powers of superintendence over inferior Courts, and I do not think it is natural to suppose that the powers given by the section are exactly parallel in the case of both the Courts. I therefore hold that the application lies

2. On the merits I do not think that a transfer should be granted In the district Court the grounds urged appear to have verged on the frivolous Here the chief ground of desire for transfer is paragraph 6 of the transfer application wherein it is urged that none of the Indian Judges in Ajmer should try this case as in one way or another they have been previously connected with it during its 26 years pendency. Since there is no European Judge in Ajmer the case will have to be tried by an Indian Judge, and the mere fact that the Court which is at present trying the case previously heard a matter in connection with the same case seems to be no ground whatever for supposing that it will not take a disinterested view of the present proceedings I do not think that any reasonable man could imagine that the Judges will be biassed or that he would not get a fair hearing The application is dismissed with costs.

Application Dismissed.

BEFORE MR R W H DAVIES

Habibullah Khan and *others* Appellant

Versus

Muhamed Umar Khan Respondent.

Civil Second Appeal No 46 of 1938 decided on 17th July 1939 arising out of the decree, dated 10th September 1938 passed by the Additional District Judge, Ajmer in Civil Appeal No 38 of 1937

C.P C. (V of 1908)—S 100—Finding based on surmise—Second appeal lies:

A first principle of law is that where there is evidence the decision must be based on that evidence and not on surmise

Mr Jawand Lal Dutt Chowdhary—For Appellants.
Mr Abdul Qadir Beg—For Respondents.

Judgment—This is a second appeal from the decision of the Additional District Judge The appeal arises out of a partition suit I have only been asked to decide two questions in the present proceedings

(1) Whether a certain property No 1 had already been partitioned previous to the institution of the suit.

(2) Whether a certain grave yard should be partitioned

2 A preliminary issue is raised as to whether this second appeal is maintainable in view of the fact that it relates only to questions of fact and that section 100 C P C precludes the filing of such an appeal A first principle of law is that where there is evidence the decision must be based on that evidence and not on surmise So far as the present appeal is concerned paragraph 7 of the judgment of the lower Appellate Court and the finding therein is based purely on surmise whereas in this connection there is evidence on the record which should have been considered before the order

of the trial Court was reversed. A question of law is therefore entailed.

3. As regards the property No. 1 the evidence is contained in a statement of the plaintiff, in that of one of the defendants and in a certain document Exh D 2. D. 2 is a Panchayatnama in which the parties had agreed to partition their properties. This property No 1 finds no place in this document. There is therefore some presumption that it had already been partitioned, but the presumption is admittedly slight The plaintiff's evidence is to the effect that so far as he knew the property in dispute had not been partitioned The defendant states that it was partitioned, that he was not there when it was partitioned, that he was 25 years of age at the time, that he was away at Jaipur and that when he returned he was informed by his father that a partition had taken place I agree with the learned trial Judge that the evidence in this connection of the defendant is more satisfactory and since the finding of the appellate Court is based purely on surmise and not on a consideration of this evidence, I set aside the appellate Court's finding.

4 As regards the question of the grave-yard both sides now admit that they do not want it partitioned, and I personally can see no ground whatever for partitioning a grave-yard

5. When the arguments in this appeal were completed a further dispute arose between the parties as to the exact extension of property No 1 This is not a question which I can decide in second appeal I therefore remand the case to the trial Court in order that enquiry may be made and a finding certified to this Court as to what property exactly is included in "property No 1" when an entry to this effect will be made in the decree of this Court Costs of the appeal will be borne by the respondent.

Case Remanded.

BEFORE M R W H DAVIS

Bhurey Singh .. Plaintiff Appellant.

Versus

B B & C I Rly, *The Agent* and *another* Defendants Respondents

Civil First Appeal No 3 of 1939 decided on 20th July 1939 arising out of the judgment and decree, dated 14th May 1938 passed by the District Judge, Jaipur in Civil Suit No. 2 C. O/37

C P C (V of 1908)—O 17, R. 1—Counsel ill—Adjournment desirable :

Plaintiff's Counsel was ill on the date of hearing It was extremely difficult for another counsel to have taken up the case at short notice The Trial Court refused to grant an adjournment. *Held* Plaintiff was seriously prejudiced and the case was remanded for re trial

Mr Mukat Behari Lal Bhargava—For Appellant.

Messrs Ballabh Das Khanna and Abdul Rashid—For Respondents.

Judgment—This is a first appeal from a decision of the learned District Judge Railway Jurisdiction Jaipur Plaintiff instituted an action against two defendants (1) Agent B B & C I Railway Company, and (2) Superintendent, J Division, R M S The plaintiff was non suited The suit was for damages for wrongful dismissal Plaintiff was originally in the Railway Educational service being Second Master of the Anglo Vernacular School at Phulera He was discharged by the B B & C I Railway Company for inefficiency

2 It is not necessary to deal with the facts of the case at present as in my opinion the suit should be remanded for re trial I think the plaintiff has been seriously prejudiced in accordance with paragraph 16 of the memorandum of appeal by the refusal of the learned District Judge to grant an adjournment on account of the illness of the plaintiff's

counsel. There is no doubt that his counsel was ill on the date of hearing i. e. 9th May 1938 having been bitten by a dog A medical certificate was produced to this effect. The result of this refusal was that on 9th May 1938 the plaintiff was not represented by counsel. It would have been extremely difficult for another counsel to have taken up the case at such short notice Moreover in my opinion the plaintiff was entirely justified in supposing that an adjournment would be granted. The results of this refusal appear in the large number of important documents which have not been exhibited in the case. I refer, for instance, to the B. B & C I. Railway's official Rules regulating the discharge and dismissal of subordinate employees I refer also to a letter written in 1934 by the Railway authorities which leaves little doubt in my mind that at that time the plaintiff was not considered inefficient. I will not say any more as I do not wish to prejudice the retrial.

3 I therefore set aside the judgment of the lower Court and remand the case for re-trial in accordance with law I direct that it be transferred for hearing to the Court of the District Judge, Ajmer, who has concurrent jurisdiction in these matters

4 As regards defendant No 2 the plaintiff stated before me that he did not wish to press the matter any further so far as this defendant was concerned I therefore dismiss the suit as regards this defendant with costs in both Courts on the plaintiff. As regards the remaining costs both in the District Court and in this Court they should be taxed as costs in the cause.

Case Remanded.

BEFORE MR R W H DAVIES

Mohan Lal ... Plaintiff Applicant.

Versus

Bhagirath and *Others* .. Defendants Respondents

Civil Second Appeal No 19 of 1939 decided on 10th August 1939, against the judgment and decree dated 26th October 1938 passed in first appeal No 70 of 1935 by the Second Additional District Judge Ajmer

(a) Specific Relief Act (I of 1877)—S 42—One joint owner suing the other—Suit for injunction sufficient

Where there are joint owners of property it cannot be said that either one or the other is exclusively in possession. If they are in fact joint owners the possession of one is the possession of both and therefore if it is held that both have a right to ownership then it is futile to sue for possession because possession inevitably follows on such a finding The only further reasonable and legal relief open to the plaintiff in this suit was, to ask the court to prevent the other joint owner from interfering with his right to the profits that necessarily arise out of joint ownership. [Para 2]

(b) Specific Relief Act (I of 1877)—S 42 (Expl)—"Able" mean Ought:

The phrase where the plaintiff being able to sue for further Relief means that where the plaintiff in the opinion of the Court and in view of the circumstances of the case ought to make a demand for a relief that flows naturally from the declaration and which is not automatically granted to him by the declaration and where he omits to do so, then the declaration should be refused until he has amended his plaint accordingly [Para 3]

Mr *Sri Krishen Agarwal* —For Appellant
Mr *Daya Shanker Bhargava*—For Respondents.

Judgment —This is a second appeal from a decision of the Second Additional District Judge

2 The facts are as follows. Plaintiff stated that he and the defendant were joint owners of a certain property

The property was leased. He stated that the defendant was denying his title to joint ownership and asked the Court to grant a declaration that he was in fact joint owner and further for an injunction to restrain the defendant from denying this fact and from interfering to prevent him from receiving his due share of the rental value of the land The trial Court granted both the declaration and the injunction The first appellate Court set aside the order of the trial Court and dismissed the suit I think that the view of the appellate Court is wrong and that the decree of the trial Court should be re-instated The first appellate Court's reason for non-suiting the plaintiff is that the suit is not maintainable under section 42 of the Specific Relief Act I think this view is both unreasonable and unfair in view of the facts of this case It seems to me that the mistake committed by the first appellate Court is a matter of common sense The question here is definitely one of joint ownership Where there are joint owners of property it cannot be said that either one or the other is exclusively in possession If they are in fact joint owners the possession of one is the possession of both and therefore if it is held that both have a right to ownership then it is futile to sue for possession because possession inevitably follows on such a finding The only further reasonable and legal relief open to the plaintiff in this suit was, as he has actually done, to ask the Court to prevent the other joint owner from interfering with his right to the profits that necessarily arise out of joint ownership Not only are there many rulings to the effect that it is not necessary where a joint tenancy is alleged to sue for possession but the Courts have gone even further than this and laid it down that where the land is in the possession of a tenant it is not necessary even then to sue for possession The object of the proviso to section 42 of the Specific Relief Act is to prevent multiplicity of suits In the present case, as I understand it, there could be no further suit for possession since immediately it is held that the plaintiff and the defendant are joint owners, then the

question of possession must automatically decide itself in favour of the plaintiff so that it would be a mere waste of the Court's time in the present case for the plaintiff to have further sued for possession The real difficulty as regards the proviso to section 42 is I think in the interpretation of this phrase "where the plaintiff being able to sue for further relief" A literal interpretation of this phrase would make nonsense of the proviso because however foolish a request may be in the circumstances, a plaintiff is of course always "able to make it. I can only suppose that this phrase means that where the plaintiff in the opinion of the Court and in view of the circumstances of the case ought to make a demand for a relief that flows naturally from the declaration and which is not automatically granted to him by the declaration and where he omits to do so, then the declaration should be refused until he has amended his plaint accordingly Here, as I have stated, the finding of the trial Court as to title automatically places him in possession and therefore the obvious further relief for which he ought to apply is not possession but an injunction for which in fact he has actually prayed The learned appellate Judge has not given a finding on the third issue namely—is the suit land the joint property of the plaintiff and the defendant? I find in the affirmative As regards this issue the whole of the documentary evidence in the case is entirely in favour of Mangla predecessor in interest of the present plaintiff, and the defendants legal representatives being joint owners of the property The oral evidence produced on behalf of the defendant was valueless to shake the strong case made out by the documents I have no doubt that the view of the trial Court is correct in this respect. In view of my finding on this issue and as regards the interpretation of the provisions of section 42 of the Specific Relief Act it follows that I disagree with the view taken by the first appellate Court

3 I therefore set aside the judgment and decree of the first appellate Court and direct that the suit be decreed in favour of the plaintiff together with costs in all the three Courts. I direct that a declaration do issue that plaintiff and defendant are joint owners of the land in dispute and further that a perpetual injunction do also issue restraining the defendant from interfering in the plaintiff's enjoyment of the property and the benefits accruing therefrom.

Appeal accepted.

BEFORE MR R W H. DAVIES.

Jamna Devi, Sh ... . Plaintiff-Applicant

Versus

Naurat Mal ... ... Defendant-Opposite party

Small Cause Court Revision No. 61 of 1939, decided on 9th August 1939 arising out of the order, dated 19th April 1939, passed by the Judge, Small Cause Court, Ajmer, in suit No 2718 of 1938

C. P. C. (V of 1908)—O. 6, R. 17—Promissory note inadmissible for insufficiency of stamp—Amendment allowed to base the suit on the loan.

Notwithstanding the fact that the promissory note was inadmissible in evidence a suit could be instituted on the original loan [Para 2]

The cause of action is always originally the loan and the promissory is at the best evidence of the loan, the loan being anterior to the note.

Mr *Kaushal Das Deedwania*—For Applicant
Mr *Panna Lal Agarwal*—For Opposite Party.

Order.—This is a revision application from an order of the learned Small Cause Court Judge.

2 The facts are that a suit was instituted on the basis of a loan and a promissory note. The note was insufficiently

stamped and was therefore inadmissible in evidence The learned Judge rightly held that in accordance with the clear ruling of this Court in the case of *Onkar Ballabh* V *Girwar Lal*[1] notwithstanding the fact that the promissory note was inadmissible in evidence a suit could be instituted on the original loan In that case as there was evidence on the record the learned Judicial Commissioner heard the matter on the merits and gave a decree for the amount of the original loan inspite of the fact that the promissory note was inadmissible In the circumstances of the present case I think it is pointless to refuse to allow the amendment. It is merely a waste of time The cause of action was always originally the loan and the promissory note was at the best evidence of the loan being in this case anterior to the note. It is always within the discretion of the Court to inulct the offending side in costs if in its opinin such a course is desirable It was suggested on behalf of the opponent that as this suit had been dismissed this should have been a revision against that dismissal and not against this order which in his opinion was only an interlocutory one. Revisions do lie against interlocutory orders and although this might strictly be construed as being an interlocutory order in point of fact it is as much a judgment as the final order dismissing the suit.

3 The rule is made absolute Costs to be paid by the opponent

1936 A M L J 37

Rule made absolute

BEFORE MR R W H DAVIES

Natha Ram .... Plaintiff.

Versus

Mangla and *others* . ... Defendants

Small Cause Court Revision No 41 of 1939 arising out of the judgment passed by the judge, Small Cause Court, Beawar, on 18th January 1939 in suit No 447 of 1938

(a) Stamp Act (II of 1899)—S. 4 & S 5, Art. 13 (b) and Art. 49.

A balance executed by the Defendant in the Defendant's Account contained a stipulation about instalments and rate of interest, *Held*, it was a promissory note and not an agrement *Further*, if it does not bear the requisite stamp no penalty can be levied and it is not admissible in evidence. [Para 3]

(b) Stamp Act (II of 1899)—S. 36—Document admitted in trial Court—Admissiblity cannot be questioned in Appeal or Revision:

An appeal or revision amounts to a stage of the same suit or proceeding Therefore, unless S 61 so allows, the High Court is precluded from refusing to admit a document in evidence which ought to have been refused in the Trial Court. [Para 3].

(c) Stamp Act (II of 1899)—S. 61—High Court cannot refund excessive stamp duty.

The section does not permit the High Court to order refund where excessive stamp duty has been levied nor to refuse to admit in evidence a document already admitted on which duty and penalty have been overcharged [Para 3]

(d) Practice—Duty of Courts—Courts must be particularly attentive to see that documents are properly stamped before they are admitted in evidence:

The attention of Courts is particularly drawn to the point that they must see that a document is properly stamped before it is admitted in evidence since once a document, inadmissible for insufficiency of stamps, is admitted appellate or Revisional Courts have no powers to reject it [Para 3].

Mr *Akshai Singh Dangi*—For the applicant.

Mr *Kaushal Kishore Bhargava*—For the Opposite Party

Order —This is a Small Cause Court revision The facts are that a certain Giga executed an instrument in favour of the plaintiff for a sum of Rs 50/ This instrument was executed by Giga on behalf of his deceased brother to whom the plaintiff asserts the money was actually lent. Giga died and this suit has been instituted against the legal representatives of Giga who are minors under the guardianship *ad litem* of their mother The learned Small Cause Court Judge dismissed the suit on the ground that consideration was not proved.

2 Two matters arose for discussion during the hearing of the suit, namely (1) the admissibility in evidence and the stamping of the document, and (2) the question as to whether consideration was or was not proved On the first issue the translation of the instrument (the original of which is in Marwari) is as follows —

> Rs. 50/—Out of the aforementioned Rs 50/ remain to be paid in instalments This amount is to be paid in two instalments. The first instalment is to be paid on 21st November 1934 and the second instalment on 8th May 1935. If the money is not paid on the dates as agreed above interest will run at 2 per cent per month on the whole amount from the date from which it was lent I have executed this Khata willingly
>
> Drafted by Ram Chander and thumb marked by Giga over a one anna stamp
>
> *26th June 1934*

3 The trial Court has considered this instrument to be an agreement. It has further held that being an agreement it is insufficiently stamped and has directed that it be admitted in evidence on payment of a penalty and the correct stamp duty In my view this is erroneous I hold this document

to be a promissory note. Section 4 of the Negotiable Instruments Act contains the definition of a promissory note. That definition is as follows —

> "A promissory note is an instrument in writing (not being a bank-note or a currency note) containing an unconditional undertaking, signed by the maker, to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument."

I particularly wish a careful note to be made of this section together with the illustrations below it and it's attendant section 5. The second para of section 5 explains when a promise to pay is unconditional. So far as this instrument is concerned in accordance with the terms of section 4 it is certainly in writing, it is signed by the maker, it undertakes or promises to pay a certain sum of money i. e. Rs. 50/- in two instalments to the plaintiff That it is due to be paid to the plaintiff can obviously be inferred from the fact that it is a debit against Giga in the plaintiff's account books The only point remaining for consideration is as to whether it is an unconditional undertaking. I have no doubt that it is unconditional. Apart from rulings to this effect the second paragraph of section 5 makes the matter quite clear This instrument is therefore a promissory note and is liable to duty as such It must be stamped as directed in article 49 of the Indian Stamp Act It is not payable on demand but in two instalments on fixed dates and is therefore liable to duty as a bill of exchange. Under article 13 (b) it is payable not more than one year after date, the date of the instrument being 26th June 1934. The promissory note does not exceed Rs. 200/- in value and is drawn singly It is therefore to be stamped with a three anna stamp. Section 35 of the Indian Stamp Act should be perused. That section lays down that no instrument chargeable with duty shall be admitted in evidence unless it is properly stamped, and proviso (a) states that although certain instruments may be so admitted when

penalty and stamp have been paid promissory notes not properly stamped shall under no circumstances be admitted in evidence at all The result is that this instrument ought to have been stamped with a three anna stamp, where as in fact it is stamped with a one anna stamp It is therefore inadmissible in evidence and the lower Court erred in admitting it. This question frequently arises for decision and I should be glad if particular attention could be paid to these remarks. Section 36 however lays down that where an instrument has been admitted in evidence except as provided in section 61 it shall not be called in question at any stage of the same suit or proceeding on the ground that it has not been duly stamped In my opinion an appeal or revision amounts to a stage of the same suit or proceeding and therefore under this section unless section 61 so allows I am precluded from refusing to admit it in evidence as it ought to have been refused in the trial Court Section 61 permits this Court to increase the stamp duty where it is of opinion that an insufficient amount has been levid but it does not permit me to order refund where excessive stamp duty has been levied nor to refuse to admit in evidence a document already admitted on which duty and penalty have been overcharged The result is that this inadmissible document must now remain on the record but no refund can be claimed for the amount illegaly over charged by the trial Court Attention is particularly drawn to this matter since as indicated above once an inadmissible document of this nature is admitted appellate and revisional Courts have no powers to reject it and litigants may thereby lose a valuable legal right which has accrued to them

4 On the second issue which is a simple one it is clear that in the absence of evidence to the contrary the deceased Giga and his deceased brother being Hindus must be presumed to have formed a joint family and that being the case in default of evidence to the contrary the debt acknowledged by Giga must be taken to be a joint family debt. The learned

trial Judge has held the instrument in dispute to be duly executed and since it is a promissory note which contains an express promise to pay it can form the basis of a suit. That being the case proof of failure of consideration lies on the party who denies it. In this case the defendants have offered no evidence and cannot therefore be said to have discharged the burden of proof.

5 The order of the lower Court is therefore set aside and it is ordered that a decree do issue in favour of the plaintiff for a sum of Rs 25/- principal and Rs 22/14/- interest together with notice costs -/8/6, costs in both Courts and future interest on the principal at 6 per cent per month from the date of the institution of the suit until realisation This amount is of course chargeable against such property as may have devolved on the legal representives from the deceased executant Giga.

Rule Discharged

BEFORE MR R W H. DAVIES

Abdullah Khan & others . Applicants

Versus

Karıman, Mst .... . Opposite Party

Criminal Reference No. 36 of 1939 made by the Second Additional District Judge Ajmer, by his order, dated 30th June 1939, in Criminal Revision No 27 of 1939 arising out of the order, dated 21st March 1939, passed by the Magistrate 2nd Class, Kekri, in Criminal Case No 9 of 1939

Criminal Procedure Code (V of 1898)—S. 205—Pardanashin lady—Dispensation to appear—Power to be liberally exercised ;

Mr Swarup Narain Agarwal—For the applicant
Mr Debi Narain Sinha—For the Opposite Party
Khan Bahadur Abdul Wahid Khan—For the Crown.

Order—This is a reference from the learned Second Additional Sessions Judge on the question of appearance of a Pardah Nashin lady in Court The granting of such dispensation to appear is to be liberally exercised. I accept the reference of the learned Second Additional Sessions Judge and am of opinion that the view taken by him is correct and that appearance should have been dispensed with in the present case The order of the learned Magistrate is set aside The appearance of the lady in question in Court is dispensed with in the present case

Reference accepted

BEFORE MR R W H DAVIES

Mool Chand ... Accused Applicant.

Versus.

Bansi Dhar ... Opposite Party

Criminal Reference No 37 of 1939 made by the Sessions Judge Ajmer by his order dated 30th June 1939 in Criminal Revision No 52 of 1939 arising out of the order dated 23rd May 1939 passed by the Magistrate 1st Class, Kekri in Criminal Case No. 17 of 1939

Child Marriage Restraint Act (XIX of 1929)—S. 5 and S 6—Accused living in British India—He arranged for the marriage to take place out of British India—No certificate under S 188 Cr P C. necessary

The allegation was that the accused was living in British India and arranged in British India for the marriage to take place out of British India The offence was therefore committed inside British India and no certificate under S 188 Cr P C was necessary [Para 1]

Mr Jawand Lal Dutta Chowdhry—For the applicant

Mr Akshai Singh Dangi—For the Opposite Party

Mr Madan Mohan Kaul—For the Crown

Order.—In this case the facts are that the accused has been charged under the Sarda Act with the arrangement of a marriage in an Indian Native State from his home in British India The charges were under sections 5 and 6 of that Act The learned Additional Sessions Judge has forwarded the case to this Court with a recommendation that the proceedings should be quashed as the certificate required by section 188 Cr P C has not been obtained In my opinion this case ought to be remanded for re-trial The case has reached a stage where two defence witnesses have been examined It seems to me that the proceedings have been improperly conducted I cannot agree with the view of the learned Additional Sessions Judge. It appears that it has never been suggested that the accused was present in the Indian Native State when the offence was committed The allegation is that he was living in British India and arranged for the marriage to take place out of British India so that it would appear that the offence was committed inside British India and no certificate under section 188 Cr P C was necessary The whole of this matter appears to have been misunderstood by the trying Court and insufficient questions appear to have been directed to the prosecution witnesses on this aspect of the case

2 In view of the observations that I have made in the present order I remand the case for re-trial.

Retrial ordered.

BEFORE MR R W H DAVIES

Dhanna l al and *others* .. Accused Appellants

Versus

Croten .. Complainant Respondent

Criminal Appeals Nos. *18 19 and 20 of 1939* decided on 9th August 1939 arising out of the judgment dated 21st June 1939 passed by the Second Additional Sessions Judge, Ajmer in Sessions Case No 5 of *1939*

Registration Act (XVI of 1908)—S 82 and S 83—Offence under S. 82 coming to knowledge of Revenue officer who refers to Police—Police prosecutes —No permission of Registration Department necessary; Cr P C. S 195

It came to the knowledge of a Revenue officer that the accused had committed offences under S 82 of the Registration Act He reported to his assistant Revenue officer who in his turn referred the case to the Police The latter agency took up the matter in court

Held As the offence did not come to the knowledge of any Registering Officer in his official capacity before a complaint thereof was made in Court no question of obtaining permission arose *Held further* S 83 does not refer to prosecutions instituted by the police or by private person *1934 All Allahabad 963* (F B.) Not Foll

(b) Interpretation of statute—Wording of Section clear—Intention to be deduced from the wording

Where the wording of the section is clear then the intention must be deduced from that wording and not from extraneous considerations [Para 5]

Mr Raghu Nath Agarwal—For Appellant No 1

Mr Jawand Lal Dutta Chowdhry—For Appellants No 2 and 3

Khan Bahadur Abdul Wahid Khan—For the Crown

Judgment—In this case there are two separate appeals against the same judgment convicting and sentencing three accused (1) Dhannalal under section 82 (a) of the Registration Act, (2) Sukh Chand under section 82 (c) of the Registration

Act and 467 I. P. C. and (3) Bhola of abetment of the two offences above. Sukh Chand is Bhola's son. Dhannalal identified Sukh Chand before the Sub Registrar.

The facts are that a certain Doonga owned a plot of land in Ajmer He died about 25 years ago leaving a widow and a son variously called Tulsi, Tulcha or Tulcha Ram. This widow married again and left Ajmer with her son Sukh Chand accused No. 2 sold this property to a certain Kishenlal for Rs. 400/- and executed before the Sub-Registrar a false document of sale alleging that he was Tulcha Ram Bhola made a statement before the Sub-Registrar supporting Sukh Chand and the document was attested by Dhannalal

3. The first point argued was whether such prosecution can lie in default of permission being granted by certain officers of the Registration Department In my opinion such permission is not necessary. In the present case the offence came to the knowledge of the Assistant Commissioner owing to his official connection with one of the Shamlat Committees. He sent the case for investigation to a Tehsildar who like the Assistant Commissioner is a Revenue Officer. The Tehsildar reported to the Assistant Commissioner who in his turn referred the case to the police The latter agency took up the matter in Court. No question therefore of any Registration Officer having taken any hand in the proceedings arises All stages in the case were carried out by Revenue Officers acting as Revenue Officers up to the time when the complaint came to be lodged in Court Section 83 (1) of the Registration Act which is apposite in this connection runs as follows

> "A prosecution for any offence under this Act coming to the knowledge of a registering officer in his official capacity may be commenced by or with the permission of the Inspector General, the Registrar or the Sub-Registrar in whose territories, district or sub district, as the case may be, the offence has been committed"

4 The High Courts are at variance over this matter. There are however only two Courts who are of the opinion

that it is necessary that sanction should be obtained from the Registration authorities I refer to the High Courts of Rangoon and Allahabad The Rangoon decision has been dissented from by the Allahabad High Court and I agree with that Court that the argument in the Rangoon case in view of the ordinary rules as regards interpretation of statutes cannot be seriously considered

5 As regards the cases in the Allahabad High Court with great respect I must dissent from the view taken in the final Full Bench case of *Emperor* v *Mohammed Mehdi* [1] The learned Chief Justice without seriously considering the actual wording of the section has turned his attention to what the framers of the Registration Act must have intended. Where the wording of the section is clear as it is here then the intention must be deduced from that wording and not from extraneous considerations The first two lines of the section namely "a prosecution for any offence under this Act coming to the knowledge of a Registering Officer in his official capacity may be commenced etc " clearly shows that this section applies only to prosecutions for offences under this Act which have come to the knowledge of a Registering Officer in his official capacity as Registering Officer Now the present offence, so far as appears from the record, did not come to the knowledge of any Registering Officer in his Official capacity before a complaint thereof was made in Court and therefore no question of obtaining permission could arise In point of fact I think this section indicates that Registering Officers below the rank of Sub-Registrar if any, ought to ask the permission of a superior before instituting a prosecution This Court is however not concerned with its further meaning here, for in any opinion it clearly does not refer to prosecution instituted by the police or by private persons. Permission in this case was therefore not necessary

1. A. I. R. 1934 All. 963

6 On the merits there is very little to be said for either Sukh Chand and Bhola appellant Nos 1 and 2 and very little more for Dhannalal who attested the document in question It is not disputed in this Court that the document was executed by Sukh Chand in the name of Tulsi Ram son of Doonga, nor that Bhola made statements to this effect to the Sub Registrar or his agent It is also not disputed that Dhannalal attested the document The only point raised was that since Tulcha Ram had not been heard of for about 25 years Sukh Chand was his legal heir and was therefore justified in dealing with the property There seems nothing to support this extra-ordinary suggestion Even if it be held under section 83 (c) that the personation was not carried out fraudulently it is still legally correct to convict him of the lesser offence under 83 (a) of intentionally giving false evidence to the Registrar Sukh Chand knew quite well that he was not Tulcha Ram and he knew also that his father's name was not Doonga He therefore intentionally gave false information and his father Bhola abetted him and so abetted also this offence Section 467 I P C also clearly applies and the second explanation to section 464 in my opinion makes both these accused guilty respectively of an offence of forgery and of abetting that forgery

7 As regards Dhannalal the defence is that he really thought that Sukh Chand was Tulcha Ram I am not prepared in view of his statement before the Court to accept this defence Even if he thought that Sukh Chand was Tulcha Ram he admits that he knew Bhola and that both of them had been known to him for 15 years or so I find it impossible to believe that he did not know that Bhola was Sukh Chand's father and therefore I do not understand how he said that this Sukh Chand or Tulcha Ram had for his father Doonga Moreover he totally denies having attested any of the documents before the Sub-Registrar. This seems

to me in the circumstances a very suspicious denial since in fact he is proved to have attested them

8 I find that all three accused are guilty of the offences with which they have been charged All three assessors were of the same opinion as regards Sukh Chand and Bhola Sukh Chand who was about 18 years of age when the document was passed and was sentenced to 1 year s R I and a fine of Rs 50/ in the case of each offence Bhola was sentenced to 3 years R I and a fine of Rs. 100/ for each offence All these sentences in respect of both the offences were to run concurrently As regards Dhannalal only one of the assessors was of the opinion that he was guilty but I prefer his view and that of the learned Second Additional Sessions Judge Dhannalal was sentenced to 1 years' R I and a fine of Rs 100/ All the accused were sentenced to further R I in default of payment of fine Contravention of the laws laid down in the Registration Act are very serious and in my opinion the sentences are not excessive I decline to interfere All the appeals are dismissed This appellate judgment should be read in both appeals

Appeal dismissed

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Editor

JYOTI SWARUP GUPTA.
Advocate, High Court.
AJMER.

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THE AJMER-MERWARA LAW JOURNAL 1939—PART IV

Alphabetical Index of Cases Reported

The *Subject Index of Cases Reported* in this Part is not being issued as a consolidated Index for the whole Volume for 1939 will follow almost immediately—Ed. A. M L J

BEFORE MR. R. W. H. DAVIES.

*Ratan Lal ... .Applicant.

Versus

Raj Mal . .... Opposite Party.

Small Cause Court Revision No. 66 of 1939, decided on 11th October 1939, arising out of the judgment, dated 24th March 1939, passed by the judge, Small Cause Court, Ajmer, in suit No. 664 of 1938.

Contract Act (IX of 1872)—S. 9 and 25(3)—Promise may be express or implied—An unqualified admission of a debt is an implied promise, Limitation Act (1908): S. 19, Debtor and Creditor

A Khata Baqi read "As regards the total amount outstanding on 29th December 1925, accounts have been completed and they total up and are debited together with interest to thirty British Indian rupees Signed by me-Bakhtawarmal I am liable to pay Rs 30/-/-"

Held, S 9 lays down quite clearly that promise may be either express or implied and as Section 25(3) does not qualify the word "promise" it must be taken that a promise under that section may be either express or implied

Held further, words 'I am liable to pay Rs 30/-" being an unqualified admission of a debt amounts to an implied promise to pay the amount mentioned. [Para. 11]

Mr Daya Shankar Bhargava—For Applicant.

Mr Debi Dayal Bhargava with Mr C. Jacob—For Opposite Party.

Order.—This is a revision application from a decision of the Small Cause Court.

2 A very important point of law is raised as it affects the whole of the indigenous banking and financial arrangements of the Province. It is by no means for the first time that the question has come before this Court. The existing law in the matter which had been in existence for many years was reversed by one of my learned predecessors in 1935.

*The following references to Rulings cited in this case are ours—Ed

1 1935 A M L J 14 2 1936 A M L J 180 3 I L R 22 C 434
4 I L R 52 B 521 5 I L R 33 Cal 1047 6. I L R 1938 Lah 234.
7 I L R 1938 Bombay 460

Thereafter a considerable number of cases have arisen for decision on the same subject News of a reverse of previous judicial decisions travels I think slowly in so far as indigenous financial transactions are concerned The decision of 1935 though in accordance with the decisions of most of the High Courts in India is yet I think repugnant to common sense and the ordinary dictates of honesty, and I am of opinion therefore that such a decision should be considered and investigated very carefully to see that it is strictly in accordance with law before, having been in existence for only four years, it is permitted to become the settled law of the province. The facts of the case are as follows

3 A suit was instituted in the Small Cause Court, Ajmer, for Rs. 30/ The suit was based on what is called a Khata Baqi The plaintiff is the adopted son of the deceased merchant in whose favour the Khata Baqi was executed Generally speaking this Khata Baqi may be described as a document in which the predecessor in interest of the defend ant admitted that this sum of Rs 30/ remained to be paid by him to the predecessor in interest of the plaintiff The plain tiff instituted the suit on the strength of this Khata Baqi because as his adoptive father was dead he was not in a position to sift the evidence as to the original debt. It is not known whether the original debt was or was not irrecoverable under the Limitation Act But that I think does not matter as the plaintiff admits that he intends to regard this Khata Baqi which is not disputed as his sole cause of action

4 One other point was raised as regards interest but the decision of that point must abide by the result of this judg ment as will be explained later The learned Small Cause Court Judge quite rightly relying on a decision of this Court in 1936[2] following the 1935 case of *Narsingdas* v *Ram Kanwar*[1], held that a suit based on such a Khata Baqi was not maintainable and non suited the plaintiff The position as I understand it is as follows

5. At some earlier period Rs. 30/- was owing to the plaintiff (or his predecessor in title) There is no intention in the present proceedings, as I have already stated, to sue on the basis of any transaction antecedent to that earlier debt. If it is intended to sue for these Rs 30/- since the amount is for practical purposes barred by the limitation law, it is necessary that there must be a new cause of action for the defendant. The plaintiff seeks to base his new cause of action on this Khata Baqi, which is executed in the Marwari language and script. The best translation which I can make of that entry is as follows:—

> "As regards the total amount outstanding on 29th December 1925, accounts have been completed and they total up and are debited together with interest to thirty British Indian rupees Signed by me—Bakhtawarmal I am liable to pay Rs 30/-"

The cause of action was thereafter admittedly kept alive by acknowledgments within the meaning of section 19 of the Limitation Act until the date on which the suit was filed in the Small Cause Court. The law dealing with the admissibility of such a claim is contained in section 25 sub-section (3) of the Indian Contract Act. That section for the purposes of this action runs as follows —

> "An agreement made without consideration is void unless it is a promise made in writing and signed by the person to be charged therewith to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits In this case such an agreement is a contract"

The Contract Act was enacted in 1872 and the Limitation Law in force at that time was the Indian Limitation Act of 1871. I think the Contract Act must therefore be intepreted in the light of that earlier Limitation enactment

6. Commenting on this section it is in my opinion most important to observe that the wording used is that such an agreement is void unless "it is a promise to pay a debt" etc,

In the present case there is no dispute that the entries in writing are signed by the predecessor in title of the person to be charged therewith The question that has to be decided is whether it amounts to a promise or not. Section 9 of the Contract Act is very important in this respect It runs as follows —

> In so far as the proposal or acceptance of any promise is made in words the promise is said to be express. In so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied"

It is I think quite obvious from this section that if the framers of the Contract Act had intended as regards section 25(3) that an express promise was to be necessary to constitute a new cause of action, they would clearly have stated so Section 9 proclaims the existence of both express and implied promises. In my opinion it is not possible to hold that section 25(3) does refer to both these types of promises It would be I think too much to hold that the framers of the Contract Act when they reached section 25 had forgotten the existence of section 9 It is therefore in my opinion clearly contrary to the provisions of the codified law to hold that an express promise is necessary for the provisions of section 25(3) I am well aware that to hold thus is to run contrary to the view of the majority of the Indian High Courts. I have carefully scrutinized all the judgments available in this connection But I can nowhere find that the provisions of section 9 of the Contract Act were considered by any of the learned Judges in the rulings on the subject. Furthermore many of those rulings also refer to section 19 of the Indian Limitation Act (IX of 1908) This Act was, as I have already stated, not in existence when the Contract Act was framed and I do not therefore understand how the word ing of section 19 as it is at present constituted, can affect the meaning of either of the two sections of the Contract Act to which I have already referred The original section of the Limitation Act of 1871 which must have been before the

framers of the Contract Act while they were drafting section 25(3) required that a promise or acknowledgment to take the case out of the statute of limitation must amount to *(a)* an express undertaking to pay or deliver the debt or legacy or *(b)* to an unqualified admission of the liability as subsisting There is therefore no basis in law whatever for holding under the provisions of section 25(3) of the Indian Contract Act that an express promise to pay is necessary in order to save a claim from the provisions of the Limitation Act. Section 9 of the Contract Act in my opinion lays down quite clearly that such a promise as is contemplated in S. 25(3) of the Contract Act may be either expiess or implied. I quite understand that this conflicts to someextent with the later provisions of section 19 of the Limitation Act of 1908, but in my opinion what has to be interpreted in this connection is not the Limitation Act but the Contract Act which deals exclusively with the point under discussion Moreover this view is in accordance with the dictum of the Privy Council in the case of *Kalka Singh* v *Paras Ram*[3] decided in 1894 It appears on the last page of the judgment to which I have referred and reads as follows —

> "In the next place although an unqualified admission of a debt no doubt implies a promise to pay, their Lordships are not prepared to hold that that is necessarily so where there is an express promise to pay in a particular manner."

This remark is strictly in accordance with the provisions of the Contract Act and further with the provisions of the Limitation Act of 1871 in contemplation of which partly no doubt the provisions of the Contract Act were framed.

7. It is of some interest to notice here that the first portion of the section of the Limitation Act of 1871 for which S 19 of the present Limitation Act has been substituted is in direct conflict with the prcvisions of section 25(3) of the Contract Act which is at present under consideration, The

old section of the 1871 Act corresponding to section 19 of the present Limitation Act was section 20, sub paragraph (*a*) of that section runs as follows —

> "No promise or acknowledgment in respect of a debt or legacy shall take the case out of the operation of this Act, unless such promise or acknowledgment is contained in some writing signed before the expiration of the prescribed period by the party to be charged therewith or by his agent generally or specially authorized in this behalf

It appears therefore that from the year 1871 to 1872 when the Contract Act was framed it was not possible for any subsequent promise when made after the expiry of the prescribed period of limitation to form the basis of a suit in respect of any claim I can find nowhere mentioned in the Contract Act that section 25(3) introduced this right notwithstanding the provisions of the old section 20(*a*) of the Act of 1871 But since the Contract Act was subsequent to the Limitation Act of 1871 it must I think be held that the Contract Act *de facto* repealed the provisions of this section 20(*a*) so far as the promise contemplated in Contract Act section *25(3)* was concerned.

8 I have already stated earlier in the judgment that the present law in this Province is repugnant to common sense and ordinary honesty and this dictum of their Lordships fortifies me in that opinion I am not able to find any real distinction between the two expressions (1) I admit that I am liable to pay Rs. 30/ and (2) I promise to pay Rs 30/ As regards the first expression I think there is no doubt that this is the meaning of the Marwari words used in the entry which I have translated Moreover the parties admit that this is so But if the present law is to be maintained in this Province this difference without a distinction is to be allowed to make the debt irrecoverable in the first place and recoverable in the second. I think that such a decision brings the law into disrepute Not only so but as I have shown it is not supported by the provisions of the Act itself

9 It is necessary next to examine the important decisions on this question I have already discussed what was previously considered to be the leading case of *Kalka Singh* v. *Paras Ram*[3]. The leading case of 1935 in this Court to which I have already referred is that of *Narsinghdas* v. *Ram Kanwar*[1] The important words there read as follows —

> "The later rulings of this Court and that in 46 Bombay rely upon the dictum of the Privy Council that an unconditional acknowledgment implies a promise to pay and it has been inferred that this promise amounts to novation of contract In my opinion however a distinction should be drawn between an acknowledgment which contains an express promise to pay and one from which a promise to pay can be inferred. Article 1 of Schedule 1 of the Stamp Act provides that a mere acknowledgment must bear a stamp of one anna An acknowledgment which contains a promise to pay must be stamped as an agreement or as a promissory note. The distinction also has been recognised by the Bombay High Court in the case of acknowledgments under section 25(3) of the Contract Act. In *Mugmal* v *Amu Chand* it was held notwithstanding the Privy Council ruling that an implied promise to pay, inferred from an acknowledgment which contains no express promise to pay a time barred debt, cannot be made the basis of a suit under section 25(3) of the Contract Act If acknowledgment always means novation of contract section 19 of the Limitation Act would seem largely unnecessary"

10. I have already discussed the distinction which the learned Judicial Commissioner here wishes to draw between an express promise to pay and an implied promise to pay and have shown that this is not borne out by the provisions of the Contract Act As regards his reference to the Stamp Act I do not think that the point is of much importance An acknowledgment for any amount is sufficiently taxed by the affixing of a one anna stamp thereto whereas as is well known a one anna stamp is only sufficient for a promissory note upto Rs 250/-, and beyond that amount two anna and four anna stamps are necessary An agreement of course must always be stamped in a different manner. These stamps will be

evidence of the type of document to which they are affixed The learned Judicial Commissioner next refers to the case of *Maganlal Vs Amir Chand*[4] decided by the High Court of Bombay in 1928 That judgment was a decision in which two Judges agreed Patkar J there states as follows.—

> Under section 25(3) Contract Act, an agreement without considera tion is void unless it is a promise made in writing to pay wholly or in part a debt of which the creditor might have enforced pay ment but for the law for the limitation of suits. If there is an express promise to pay made in writing and signed by the person to be charged therewith to pay a time-barred debt, it may be made the basis of a suit but we think that an implied promise to pay to be inferred from an acknowledgment which contains no express promise to pay a time barred debt cannot be made the basis of a suit.

With great respect the learned Judge has here himself substi tuted the phrase express promise' for the word "promise' used in the Act It does not appear that section 9 of the Contract Act was ever brought to his notice He refers in his judgment to the case of *Mani Ram* v *Rupchand*[5] decided by the Privy Council in 1906 There is a further dictum in that case which although it does not actually quote the law on the subject clearly supports the view which I now take That passage reads as follows —

> "An unconditional acknowledgment has always been held to imply a promise to pay because that is the natural inference if nothing is said to the contrary It is what every honest man would mean to do There can be no reason for giving a different meaning to an acknowledgment than that there is a right to have the accounts settled, and no qualification of the natural inference that, whoever is the creditor shall be paid when the condition is performed by the ascertainment of a balance in favour of the claimant

There is little doubt I think that it was this phrase 'has always been held to imply a promise to pay which caused Patkar J to make use of the phrase 'express promise to pay With great respect it appears to me to be likely that it was

with the object of safe-guarding the provisions of section 19 of the Limitation Act 1908 that this word "express" was introduced into the ruling Baker J in his decision in the same case speaks of a distinct promise to pay That phrase appears to me to include both an implied and an express promise and does not I think help in solving the difficulty The case of *Bal Krishna* v. *Jaishanker*[7] decided in a Letters Patent Appeal in the Bombay High Court in 1937 follows the Bombay judgment to which I have just referred. The previous rulings were considered and not the provisions of the Contract Act Wassoodew J there states.—

> "The distinction between a mere acknowledgment under Section 19 (Limitation Act) and a "promise" under section 25(3) Contract Act, has been well recognized After the period of limitation there must be a fresh promise to pay "

I do not think that any new argument is raised in that case. My attention has been drawn to the 1938 case of *Shanti Prakash* v *Harnam Das*[6] decided by a Full Bench of the Lahore High Court That decision accords with the view I have taken on the ground that it has always been held in the Punjab that such acknowledgments could amount to a promise to pay under section 25(3) of the Contract Act. With respect I agree with that decision on the legal grounds to which I have already referred . That Full Bench ruling explains that much inconvenience and dislocation of business would be caused if the law were suddenly to be altered There is no doubt that such dislocation as their Lordships foresaw has occurred in this Province by this very alteration to which they alluded, and the danger of which they fore-saw.

11. The position is therefore that the Rule in *Narsingh-das* v *Ram Kanwar*[1] finds no real basis in law. It has only been in existence for four years and having regard to the probable date of its publication for even a shorter time it reversed the previous law in the Province. It is not based on equity and good conscience. It is repugnant to common

sense It tends to unsettle indigenous financial arrangements It has not I think yet become generally known in the Provin ce since frequently cases reach this Court where acknowledg ments under the old law are still accepted by indigenous financial interests As against these arguments for the reversal of this ruling only the legal maxim of "stare descisis" can I think be urged The object of this maxim however is to ensure that well recognized laws shall not be unnecessarily disturbed. In my opinion the maxim has no force in the present case I therefore hold that a promise under section 25(3) of the Contract Act means in accordance with section 9 of that Act both an express and an implied promise. Whether any particular form of words amounts to an express or implied promise is a question of fact which must be decid ed with reference to the phrases used in each particular case. So far as the present case is concerned I have no doubt that the words 'I am liable to pay Rs. 30/ being an unqualified admission of a debt do amount to an implied promise to pay the amount mentioned This view is strictly in accordance with the Privy Council dictum in *Kalka Singh* v *Paras Ram*[3]

12 The result is that a new cause of action has arisen and the plaintiff in entitled to sue on this cause of action I therefore remand the case to the Small Cause Court with directions to determine it in accordance with the law herein laid down As regards the question of interest raised in paragraph 4 of this judgment, that must also now be first determined by the trial Court Costs in this revision applica tion should he taxed as costs in the cause

Case remanded

BEFORE MR. R W. H. DAVIES.

Mohan Lal .... Applicant.

Versus

Ram Chandra, F. and *Others* .... .. Opposite party.

Small Cause Court Revision No 45 of 1939, decided on 23rd October 1939, arising out of the Judgment, dated 14th February 1939, passed by the Judg', Small Casue Court, Nasirabad, in suit No. 247 of 1936.

Contract Act (IX of 1872)—S. 25 (3)—Acknowledgment after Limitation—Acknowledgment amounts to a promise to pay and suit lies, Limitation Act S 19 and Debtor and Creditor

A Khata Baqi was acknowledged after the period of limitation for the original debt had expired *Held*, An acknowledgment amounts to a promise to pay Hence the suit is maintainable

Mr *Raghu Nath Agarwal*—For Applicant
Mr *Mukat Behari Lal Bhargava*—For Opposite party.

Order.—In this revision application the facts are that a Khata Baqi was acknowledged after the period of limitation of the original debt had expired This Khata Baqi was signed by the person to be made liable and stated that the sum of Rs. 408/- still remained to be paid. There was also a stipulation as regards reduction of interest on the amount. In accordance wfth the judgment of this Court in the case of *Ratan Lal* v *Raj Mal*[1] No 66 of 1939, such an acknowledgment now amounts to a promise to pay under section 25 (3) of the Contract Act. The amount is therefore decreed with costs together with future interest at 6 per cent from the date of the institution of the suit until realization

Rule made absolute.

1 1939 A M L J 137—*Ed*

BEFORE MR R W H DAVIES

Kamal Mohammad ... . Applicant.

Versus

Zubeda Mst. .. .... Opposite Party

Small Cause Court Revision No 51 of 1939 decided on 24th October 1939, arising out of the judgment dated 11th April 1939 passed by the Judge, Small Cause Court, in case No 3176 of 1938.

(a) Transfer of property Act (1882)—S 107—Unregistered Rent Note—Not admissible

Any instrument of lease (in default of a Local Government notification to the contrary) if reduced to writing and unregistered must be rejected in a Court of Law [Para 4]

(b) Evidence Act (I of 1872)—S 91—Unregistered Rent Note—No oral evidence permissible about rate of rent agreed and recorded—But payment of rent or of relationship of landlord and tenant can be proved independently of the document.

If a rate of rent has been agreed upon between the parties and recorded in any unregistered lease no oral evidence may be given of that agreed rate. But if rent has been paid there is nothing to prevent proof of that payment being adduced independently of the document. In the same way if as a matter of fact the parties are related to each other as landlord and tenant there seems to be no reason for supposing that fact cannot also be proved. Section 91 is not intended to prevent persons giving evidence about facts which are in actual existence apart from any documentary evidence on the subject [Para 7]

If the plaintiff wishes to recover rent the fact that there is a document or lease in existence which ought to have and has not been registered and is therefore inadmissible will not prevent him from adducing evidence of the existence of the fact that the defendant has been in possession of his property as a tenant and has at some time been paying rent to him at some definite rate, oral evidence of which may also be accepted in Court. [Para 7]

Mr *Shamshul Gani Khan*—For Applicant.

Mr *Debi Narain Simlote*—For Opposite party

Order.—This is a revision from the Small Cause Court, Ajmer

2. An important point of law is raised. The suit was for arrears of rent. The plaint alleged that the defendant leased from the plaintiff five rooms in the plaintiff's house for a period of one year on a rent of Rs 6/- p m. It was further alleged that the contract was an oral one though it was admitted in the plaint that a document was also executed to the same effect. The plaint further alleged that on 19th December 1937 and on the 19th of subsequent months the defendant failed to pay the rent. The claim was for a sum of Rs 70/- arrears of rent or Rs 70/- for use and occupation of the demised premises There was no claim for ejection The written statement denied that the relationship of landlord and tenant existed between the parties and therefore alleged that no rent was due to the plaintiff The document referred to above evidencing the oral agreement of lease is to be found on the record as Exh. P 1 It is stamped with a eight anna stamp and is signed both by the alleged landlord and by the tenant It is therefore a lease of immovable property. The 2nd paragraph of S. 107 of the Transfer of Property Act runs as follows —

> "All other leases of immovable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession"

The fourth paragraph of that section states —

> "The Local Government may by notification direct that leases of immovable property other than leases from year to year or for a term exceeding one year may be made by unregistered instrument."

3 There has however in this connection been no such notification by the Local Government of Ajmer-Merwara. Therefore all leases of immovable property in the Province if they are reduced to writing must be registered. This lease

which was for a period of only one year was admittedly not registered

4 Now as is clear from S 107 a lease of the present kind since the period for which the lease is granted does not exceed one year may be made either by a registered instrument or by oral agreement If there is an oral agreement but it is reduced to the form of a written lease, that lease must be registered under the provisions of S 107 If it is not registered it cannot be adduced in evidence unless the Local Government concerned has notified that the lease may be made by an unregistered instrument. Since, as I have already stated, that is not the case in this Province this instrument being unregistered cannot be admitted in evidence I think the only meaning that I can attach to S 107 the second paragraph of which was substituted for the original by an amendment in 1904, is that any instrument of lease in default of a Local Government notification to the contrary if reduced to writing and unregistered must be rejected in a Court of Law

5 Section 91 of the Evidence Act states that when the *terms* of a contract of other disposition of property have been reduced to the form of a document, no evidence shall be given in proof of the *terms* of such contract or disposition except the document itself or secondary evidence of its contents where that is permissible in law In the present case there is no doubt that the terms of this disposition of property have been reduced to the form of a document and therefore no evidence can be given in proof of the terms of this disposition except the document itself Now the document is unregistered and as under section 107 (2) I have held that it is necessary that it should be registered it is clear that it cannot be adduced in evidence The question then arises "Can this lease or disposition of property be proved and can any evidence be adduced as to the rent that was being or

ought to have been paid and how long if at all it has remained unpaid?" My attention has been directed to many rulings of the Calcutta High Court in this connection. The earliest case in that Court on which all subsequent cases appear to be based is that of *Surabh Narain Lal* v. *Catherine Sophia*[1] decided in 1896 The two learned Judges who decided that appeal there state as follows.—

> "A tenant can prove his tenancy right without proving his lease if he has one and so even if the provisions of leases are inadmissible for want of registration this will in no affect the plaintiff's right to recover the possession of the land"

With great respect this view is I think correct but there is no indication that the learned Judges examined the law on the subject nor is it possible to deduce the means by which it was held that section 91 of the Evidence Act had this meaning. None of the subsequent rulings of that Court throw any light on the subject

6. As regards the two Madras rulings which have been brought to my notice the case of *Nangali v Raman*[2] has been dissented from in a subsequent ruling of the same Court. With respect I agree with the later Judges that that case is not correctly decided The second Madras case is *Venkatagiri v Raghava*[3]. Here again apart from the earlier case to which I have already alluded there is no consideration of the authorities nor apparently of the law on the subject. The result of that case is to affirm without reasons the view taken by the Calcutta High Court to which I have already alluded in *Surabh Narain* v *Catherine Sophia*[1] The next case to which my attention was drawn was *Nago* v *Tukaram*[4] decided by the Judicial Commissioner of Nagpur in 1917 The same principle has there been again affirmed as in the Calcutta rulings, but as I have stated, I am not prepared to accept this view without further consideration in view of the absence of any expressed ratio decidendi.

The following references to rulings cited in this case are ours—Ed
1 I L R Calcutta 2 I L R 7 Mad 226 3 I L R 9 Mad 142
4 A I R 1918 Nag 69 5 I L R 41 Bom 466

7 The true interpre tation of section 91 of the Evidence Act in this connection appears I think in the case of *Chotulal* v *Bai Mahkor*[8] decided by the Bombay High Court in 1917 That case related to a partition but a partition is also no less than a lease a disposition of property and the same principles in my opinion therefore apply to both where section 91 of the Evidence Act is concerned. Section 91 prohibits any oral evidence being given of the terms of any disposition of property which has been reduced to writing and it must therefore be decided here what is the exact meaning of the phrase 'the terms of any disposition of property' In this connection the dictionary meaning of "terms" is interesting It runs as follows:—

> Propositions, limitations or provisions stated or offered as in contracts for the acceptance of another and determining the nature and scope of the other conditions as, the terms of the sale *Terms* cash

The gist of this definition is that terms are conditions or provisions determining the nature and scope of an agreement That being the case all the agreed arrangements in a docu ment will I think be incapable of proof by oral evidence But that does not mean that external matters existing apart from the document are not proveable Facts of this kind may be proved in the same way as any other judicial fact. If therefore a rate of rent has been agreed upon between the parties and recorded in any unregistered lease, no oral evidence may be given of that agreed rate But if rent has been paid, there is nothing so far as I understand the section to prevent proof of that payment being adduced independently of the document. In the same way if as a matter of fact the parties are related to each other as landlord and tenant there seems to me to be no reason for supposing that that fact cannot also be proved. The object of section 91 is I think to prevent litigants giving conjectural evidence about facts which have been made certain by a written record. It is not intended to prevent persons giving

evidence of facts which are in actual existence quite apart from any documentary evidence on the subject Applying these principles to the present case if the plaintiff wishes to recover rent the fact that there is a document or lease in existence which ought to have and has not been registered and is therefore inadmissible will not prevent him from adducing evidence of the existence of the fact that the defendant has been in possession of his property as a tenant and has at some time been paying rent to him at some definite rate, oral evidence of which may also be accepted in Court

8 As regards the fact that defendant is in possession the written statement makes the point clear. The learned Small Cause Court Judge has apparently partially relied on the lease which, as I have already held, cannot be adduced in evidence. There remains therefore only the evidence of plaintiff's husband Yusuf Ali and three witnesses on behalf of the plaintiff who did not appear as she was a Pardah Nashin lady All these witnesses are agreed in stating that the defendant is the plaintiff's tenant and that the rent fixed between the parties was at the rate of Rs 6/- p m The plaintiff's husband states that only one month's rent was paid at Rs. 5/- p. m In my opinion the rate of rent agreed upon must be regarded as one of the terms of the lease and therefore no oral evidence can be allowed as regards that rate The only evidence that can be considered in this connection is that Rs 5/- was actually paid for one month. In my view the evidence of the plaintiff as regards the existence of the tenancy is preferable to that of the defendant

9. I hold that the relationship of landlord and tenant existed between the parties as stated in the plaint from 19th November 1937 I accordingly allow rent at the rate of Rs 5/- p. m from the 19th November 1937 upto the date of the institution of the suit less Rs. 5/- one month's rent

already paid There will be a direction also for the payment of future interest at 6% from the institution of the suit until realization of the amount. I direct that costs in both Courts should be borne by the defendant.

Decree Modified

BEFORE MR. R W H DAVIES.

Kishan Das and *Others* .. Appellants.

Versus.

Noor Mohamed and *Others* Respondents.

Misc. Civil Second Appeal No 12 of 1939 decided on 18th October 1939 arising out of the order dated 3rd January 1939 passed by the Second Additional District Judge, in Misc. Civil Appeal No 72 of 1938

Civil Procedure Code (V of 1908)—O 21 R 15 Application for execution in Firm's name—Signature by one partner sufficient—It not necessary to state that it is for benefit of all partners

Where one or any of the decree-holders file an execution application without stating on that application that they are acting in the interests of the whole body of the decree holders, their action does not necessarily invalidate the execution application and if any such defect is pointed out amendment of the application should be allowed Where a firm is concerned these remarks do not strictly apply So soon as the name of the firm is entered in an application this entry automatically signifies that the application is being made on behalf of all the partners in a firm (Para 4)

Messrs. *Ghisu Lal Dhanopia* and *Akshai Singh Dangi*—For Appellants.

Mr *Abdul Qadir Beg*—For Respondents.

Judgment—In this second appeal the facts are that a firm obtained a decree in the name of the firm through one of the partners—Manohar Lal The execution application was filed by the same firm through an other partner named Kishen

Lal Both the Court of first instance and the District Court held that this execution application suffered from a fatal defect in that it was not entered in the application that it was being made for the benefit of all the partners This view is not correct in law. As is well known any partner in a firm is entitled to cairy on the business of the firm in his own name. It is true that partners in a firm are joint owners but transactions on behalf of the firm are by law capable of being signed by one partner and being valid so far as the firm is concerned. Moreover not only is this the law, but it is the ordinary practice Therefore when a decree is passed in the name of a firm it is automatically passed for the benefit of all the partners When an execution application is made in the name of the firm it is automatically made on behalf of all the partners merely by reason of the fact that the application stands in the firm's name even though it may only be signed by one of the partners There is a great difference between a firm and a series of unrelated joint owners.

2 The learned Judge of the District Court has relied upon a case of this Court *Muhammed Aziz Ullah* v *Abdullah* decided by Norman J C in 1936 That case was in fact not a decision at all The learned Judge there merely stated that he was inclined to the view that it was necessary that where a darkhast application was filed by two out of eight joint holders it should be mentioned that the darkhast was filed on behalf of all of them It is unfortunate that the Head Note appears as if this point had been finally decided by this learned Judicial Commissioner [An expression of opinion by a Judge is not necessarily a decision] Moreover so far as the decision is concerned the authorities are not discussed This supposed decision has unfortunately been followed by Weston J. C in a subsequent case in 1937 I think there is now no doubt that this is not the correct view in law Order 21, R. 15 does not state that the execution application must be endorsed to the effect that it is made on behalf of all the joint decree holders.

Moreover that this is not the meaning of the rule is apparent, I think, from the second paragraph of that rule which states that it is the Court's duty where an application is made by any one out of several joint decree holders to satisfy itself that proper steps are taken to ensure that no miscarriage of justice occurs as regards the other decree holders.

3 The opposite view has it is true, been taken in a Patna case, but that judgment has been dissented from on several occasions. The general view that is now taken of the law appears very clearly in the latest case on the subject *Rani Veeramnani* vs *Rajaveerabasava* decided in 1939 by the Madras High Court There it is held that the omission in an application for execution by any of several decree holders to mention that there are other decree holders does not necessarily invalidate the application and the Court when its attention is drawn to the fact can allow the application to be amended The decision in this case is moreover strongly supported by two Lahore cases *Ghanaya Lal* v *Madho Parshad*[1] and *Nasiruddin* v *Dost Mohammad*[2] In the present case however, as I have stated as the application is by a firm this question is not in my opinion materially in issue.

4 I agree with the learned Second Additional District Judge that the fact that there was a dissolution of the firm subsequent to the filing of the execution application makes no difference Where a decree is not amended execution should issue in the name of the unamended decree holder There was nothing therefore in the present case to prevent the decree being executed by one of the partners on behalf of the firm I therefore hold that where one or any of the decree holders file an execution application without stating on that application that they are acting in the interests of the whole body of the decree holders, their action does not necessarily invalidate the execution application and if any such defect is pointed

1. A. I. R. 1931 Lahore 600. 2. A. I. R. 1933 Lahore 655

out amendment of the application should be allowed But I would also like to point out that where a firm is concerned these remarks do not strictly apply So soon as the name of the firm is entered in an application this entry automatically signifies that the application is being made on behalf of all the partners in the firm

5 I therefore set aside the findings of both the lower Court and the first appellate Court and direct that the execution application be re-instated with costs in all Courts

Appeal accepted.

BEFORE MR. R W H. DAVIES

Ram Pertab B Goel, Mr . . Applicant.

Versus

Ram Chandra Agarwal, Mr. Opposite Party

Small Cause Court Revision No. 64 of 1939, decided on 6th October 1939, arising out of the order, dated 13th May 1939, passed by the judge, Small Cause Court, Ajmer, in Suit No 1384 of 1937

Civil Procedure Code (V of 1908)—S 73 & S. 60 (1) (i) (as emended by Act IX of 1937)—Half salary of public servant already under attachment under S. 60 (1) (i) before enactment of Act IX of 1937—A subsequent creditor entitled to get a smaller portion of the salary attached under Act IX of 1937—Both still entitled to reteable distribution of salary as attached under previous decree

A creditor institutes a suit prior to 1st June 1937 and obtains a decree against a public servant. Half of the salary of the public servant is attached under S 60 (1) (i) as it stood before amendment by Act IX of 1937. Another creditor institutes a suit after 1st June 1937 and obtains the decree against the same public servant In this execution a smaller portion of the salary is attached according to the provisions of S 60 (1) (i) as amended by Act IX of 1937 *Held*, both decree holders are entitled to-rateable distribution of the half salary attached in the first decree

Mr *Daya Shanker Bhargava*—For Applicant
Mr *Kaushal Das Deedwania*—For Opposite party

Order —This is a revision from a decision of the Small Cause Court The facts are as follows

2 A is a debtor, a public servant. B is his creditor Originally so far as the salary of A was concerned, in certain circumstances one of which was the present, one half of his salary less Provident Fund could be attached for the payment of debts Subsequently a new law was enacted which laid down that in the present case only half of his salary over Rs 100/ less Provident Fund subscriptions could be attached for the same purpose. That amendment to the Civil Procedure Code further laid down that the reduction in the amount of money that could be attached would not apply to suits or proceedings instituted before 1st June 1937 The present creditor B is such a creditor having instituted a suit for the amount due to him before 1st June 1937 The result is that so far as he is concerned the amount that can be attached from A s salary is half of that salary less Provident Fund. A subsequent creditor is only permitted to attach half of such of the salary as is over Rs. 100/

3 The question that now arises for decision and has been in fact decided by the Small Cause Court Judge is as to how this amount is to be distributed between the creditors one of whom instituted his action before 1st June 1937 and another who instituted proceedings after that date It might appear on first sight that the earlier creditor should receive preferential treatment in this respect But in my view and I agree with the learned Small Cause Court Judge the provisions of section 73 of the Civil Procedure Code prevent any such preferential treatment being given Section 73 of the Civil Procedure Code is quite clear and there is no doubt that if preferential treatment were to be given to the first creditor the terms of that section would be transgressed The learned counsel for the opponent in my opinion rightly said that had legislature intended to alter the clear directions of that section, they would while enacting the variation in the section to which

I have already referred also have enacted a proviso to section 73 There is no such proviso on the statute book and therefore I agree with the learned Small Cause Court Judge that the assets should be distributed in accordance with the terms of section 73.

4. The rule is therefore discharged and the application dismissed. In the circumstances of the case I make no order as to costs.

Rule discharged.

BEFORE MR R. W. H. DAVIES.

Chameli, Mst ... . .. Applicant.

Versus.

Chhiter Mal and *Others* .. .... Opposite parties

Small Cause Court Revision No 60 of 1939, decided on 9th October 1939, arising out of the order, dated 6th April 1939, passed by the Judge, Small Cause Court, Nasirabad, in suit No 129 of 1937.

Civil Procedure Code (V of 1908)—O. 8, R. 6—Claim for board and lodging cannot be claimed as a set off.

Where no amount is agreed for board and lodging the amount claimed cannot be called an "ascertained" sum Hence it cannot be claimed by way of set off

Mr *Ram Chandra Arun*—For Applicant
Mr. *Rikhab Chand Jain*—For Opposite parties

Order.—The facts of this Small Cause Court Revision are as follows.

2. Plaintiff filed a suit for a sum of money which was admitted by the defendants. These latter however pleaded a set off. I have only to decide here whether the decision of the learned Small Canse Court Judge that this set off was admissible is

in accordance with law Order 8, Rule 6 lays down that a defendant at the first hearing of a suit for the recovery of money from him may present a written statement containing particulars of an ascertained sum of money sought to be set off by him against the plaintiff's statement of claim The legal point for decision here is the meaning of the word 'ascertained The applicant urges that the set off claimed here is not one for an ascertained sum I agree with his view Amongst other sums sought to be set off is one of Rs. 35/ alleged to be due to the defendant because a certain relative of the plaintiff was fed and housed by the defendants for a certain period of time No fixed amount either monthly or for the whole period was ever agreed on between the parties to be charged for the boarding of this relative The amount fixed therefore by the defendants is purely arbitrary and could not be decided by the Court without taking evidence and hearing counsel in the matter In my opinion this amount cannot be called an ascertained sum of money The learned Small Cause Court Judge has I think committed a legal mistake in his interpretation of the meaning of the word 'ascertained "

3 The case is therefore remanded to his Court with directions that it should now be determined in accordance with law and with regard to the above remarks. The applicant must receive his costs in this Court from the appellant. Rule made absolute

Case remanded

BEFORE MR. R W. H. DAVIES.

Mehta Surat Singh .... Appellant

Versus.

Amar Singh, S and *Others* ... . Respondents.

Civil First Appeal No 44 of 1939, decided on 24th October 1939, arising out of the decree, dated 12th April 1939, passed by the Judge, Small Cause Court, Ajmer, in suit No 16 of 1939.

Ajmer Laws Regulation (III of 1877)—S. 33—Interest to be decreed not to exceed the Principal received by Defendants.

An account should be taken of sums of money and value of goods and so forth actually advanced to the plaintiff and an amount equal to this sum—and no more—be decreed for interest

Mr *Shri Kishen Agarwal*—For Appellant

Mr *Raghu Nath Agarwal*—For Respondents

Judgment.—This is a first appeal An ex-parte decree was passed in the lower Court for a sum of Rs 13,000/- The only point raised in this Court was as regards the amount of interest allowed by the trial Court It is quite clear that there has been a slight mistake in this connection Section 33 of Regulation III of 1877 lays down that interest which may be decreed by a Civil Court may not exceed the amount of the principal sum of money received by the defendants. The arguments in this connection are clearly set out in the case of *Ram Chander* Vs *Radha Kishen* decided by this Court in 1934

2 I therefore direct that an account be taken of sums of money and the value of goods and so forth actually advanced to the plaintiff and order that in the matter of interest an equivalent sum to this sum and no more is added and that an amended decree do issue in respect of this sum. As regards

costs the appellant did not care to defend the suit in the lower Court I direct that 1/10th of the respondent's costs be paid by the respondent and the remainder by the appellant. The appellant is responsible for his own costs. I allow interest at 6 per cent on the amount decreed from the date of the institution of the suit until realization

Appeal accepted

BEFORE MR R W H DAVIES

Suraj Mal Plaintiff Appellant.

Versus

Ghisu Lal and *Others* Defendants Respondents.

Civil First Appeal No 29 of 1939 decided on 5th October 1939 arising out of the judgment and decree dated the 8th February 1939 passed by the 2nd Additional District Judge Ajmer in civil suit No 11 of 1934

Specific Relief Act (I of 1877)—S 42—Over-all price fixed for several properties—Sale deed cannot be set aside for some properties

A sale deed transferred a series of properties for all of which taken together an over all price had been fixed No particular price was fixed for any particular property

Held the sale deed was joint and indivisible. A Suit to set aside the sale deed with respect to some of the properties did not lie.

Mr *Moti Prasad Mishra*—For Appellant
Messrs. *Ram Chandra Arun Pannalal Agarwal Shyam Sunder Lal*—For Respondents.

Judgment—In this first appeal the plaintiff who was non suited in the lower Court instituted a suit against the respondents to set aside a portion of a sale deed on the ground that that sale deed was fraudulent. The suit was filed in the

year 1929 For totally insufficient causes it has now come up no less than 10 years later in first appeal. The suit was perfectly simple and most of the time appears to have been spent between the Court of the Sub Judge, Beawar and the District Court in deciding what was the valuation for jurisdiction purposes and also for Court fees. The matter could and ought to have been decided at one hearing. So far as this appeal is concerned it must plainly be dismissed. The sale deed which is translated at page 152 of the Paper Book is a succinct document and very cleary transfers a series of properties for all of which taken together an over-all price has been fixed Nowhere has any particular price been fixed of any particular property and the sale deed is therefore joint and indivisible so far as these properties are concerned. The appellant plaintiff instituted the suit to set aside the sale so far as some of these properties were concerned. The lower Court rightly held that the whole deed was indivisible and non suited the plaintiff. No other view is possible.

2. This appeal is therefore dismissed with costs which are assessed at the full amount prorata so far as respondent No. 1 is concerned, and at the minimum fee of Rs. 150/- so far as respondents Nos. 2 and 3 are concerned.

Appeal dismissed.

BEFORE MR. R. W. H. DAVIES.

Lobo, L. S. .... Applicant.

Versus.

Jagat Narain Khatri .... .. Opposite party.

Small Cause Court Revision No 70 of 1939, decided on 23rd October 1939, arising out of the judgment, dated 18th July 1939, passed by the judge, Small Cause Court, Ajmer, in Small Cause Suit No. 1460 of 1939.

Usurious Loans Act ( )—S. 3—Loan to Government servant—Agreed interest at Rs 75% reduced to 33%.

Loan advanced to Government servant on basis of promissory note Interest at 75% was agreed upon in the promissory note

Held The rate of 75% was excessive and transaction unfair Rate of 33% was reasonable in the circumstances of the case [Para 1]

Mr *Mukat Behari Lal Bhargava*—For Applicant.

Mr *Dubi Dayal Bhargava*—For Opposite party

Order —In this revision application the facts are that a Government servant, a telegraphist, borrowed Rs 300/ from a money lender Interest at 75% was agreed upon in the promissory note After a sum of Rs 582/ had been paid the money lender brought another suit for Rs 300/ together with interest The period of the loan was 37 months. Under the Usurious Loans Act section 3 in my opinion the rate of 75% is excessive The transaction was also I think substantially unfair The borrower is a Government servant and therefore it cannot be said that the loan was entirely unsecured As regards the high rate of interest there might possibly be circumstances making such a rate admissible Here no reasonable explanation has been offered In my opinion in the circumstances a rate of approximately 33% is reasonable.

2 I therefore open the transaction from the beginning, hold that the original loan was Rs 300/ and direct that interest at a rate of 33% be calculated on that loan from the date of the transaction until the date of the suit This amount must be repaid by the borrower to the lender less a sum of Rs 582/ already paid. I am told that the creditor has by attachment of the debtor s goods secured a further sum of Rs. 75/ but no judicial proof has been offered of the circumstance I direct therefore that in accordance with the principles herein laid down what is owing be

calculated and a decree do issuse for the amount together with future interest at 6% from the date of the institution of the suit until realization I make no order as to the costs of this revision application. Rule made absolute.

Decree modified.

BEFORE MR. R. W. H. DAVIES.

Bhoma and *Others* ....Appellants

Versus,

Crown .. .. Defendants

Criminal Appeal Nos 21, 22, 29 and 30 of 1939, decided on 30th October 1939, arising out of the order passed by the Sessions Judge, Ajmer-Merwara, Ajmer.

Criminal Trial—Committal Proceedings—Duty of Magistrates—Nose cutting— Ordinarily committal.

Ordinarily cases of nose cutting should be committed to the Court of Sessions for trial.

Messrs *Parmatma Swarup and Jawand Lal Dutta Choudhary*—For Appellants

Khan Bahadur Abdul Walid Khan—For the Crown.

Judgment.—Read the order of this Court in this connection dated 25th October 1939 The case from the Court of the Extra Assistant Commissioner and Magistrate First Class, Beawar, has now been received. From a perusal of the two cases and from the statement of Bhanwarlal it appears that the two transactions were so intimately connected that they should have both been tried in the same Court. Moreover the sentences inflicted in the Beawar Court appear to be totally inadequate, if the accused have been rightly convicted.

2 As regards the proceedings in the Sessions Court I am satisfied that the two accused have been gravely prejudiced by the appointment of only one counsel to defend them when their defences were mutually conflicting It would be unwise to enlarge on the matter here The proceedings in Case No 84 of 1938 of the Court of the Extra Assistant Commissioner Beawar, and Sessions case No 2 of 1939 are quashed I order that both cases be heard together afresh in the Sessions Court if the case against the accused in the Court of the Extra Assistant Commissioner does not end in acquittal I might add for the general information of Criminal Courts in the Province that ordinarily cases of nose cutting should be committed to the Court of Session for trial

Ordered accordingly

BEFORE MR R W H DAVIES

Nanda .. Applicant.

Versus

Hira and *Others* ... .. Opposite parties.

Criminal Revision No 48 of 1939 decided on 31st October 1939 arising out of the order dated 30th June 1939 passed by the 2nd Additional Sessions Judge, Ajmer in Criminal Revision No 49 of 1939

Criminal Procedure Code (1898)—S 437 and S. 439—Applies when accused ought to have been tried by Sessions Court and when the accused has been improperly discharged

Not only has it to appear that the accused person who was acquitted ought to have been tried in the Sessions Court, but it is also necessary that it must be shown to the satisfaction of the Revisional Court that the accused has been improperly discharged by the inferior Court

Mr *Shamshul Gani Khan*—For Applicant.
Mr *Shyam Swarup Mathur*—For Opposite party
Mr *Madan Mohan Kaul*—For the Crown

Order.—In this criminal revision application the facts are that an accused was charged in a magisterial Court with an offence of forgery of a valuable security under section 467 I P C., a case exclusively triable by the Court of Session The learned Magistrate failed to realize this He considered the case on its merits and after weighing up the evidence came to the conclusion that it was unsatisfactory, and acquitted the accused An application was then made before the Sessions Court requesting revision of this order of the Magistrate. The learned Sessions Judge declined to interfere A revision has now been instituted in this Court The provisions of Section 437 Cr P C are important in this connection Not only has it to appear that the accused who was acquitted ought to have been tried in the Sessions Court, but it is also necessary, as I understand the Section, that it must be shown to the satisfaction of the revisional Court that the accused person has been improperly discharged by the inferior Court. Section 439 Cr P C which vests these revisional powers in the High Court permits the High Court to interfere in its discretion I have considered the evidence in the case and have studied the judgment of the learned Magistrate as also of the learned Sessions Judge I do not think that the accused person has been improperly discharged While it is true that strictly speaking the accused should have been committed to the Court of Session, from a perusal of the evidence I am of opinion that even if the case had gone to the Sessions Court, the accused would have inevitably been acquitted I do not therefore see any point in interfering under Section 439 Cr P C The only result would be waste of time and public money, and the accused would, as I have already stated, in my opinion be certainly again acquitted

2 I therefore decline to interfere

Revision rejected

Law Point arising in a Case.

Note—The Law Point arising in the under mentioned case is given The Judgment is not printed in full These Law Points are given only for convenience of our readers and are not for being cited as such —Ed A M L J)

BEFORE, LORD ROMER, SIR LANCELOT SANDERSON AND SIR GEORGE RANKIN

Biradh Mal, Seth and *others* .. Applicants

Versus

Sethani Prabhabhati Kunwar and *others* Respondetns

Privy Council Appeal No 44 of 1937

(a) Civil P C (1908)—O 41 R 27—Important witness refused by trial court on account of his being engaged as counsel in the case—Appellate Court can record his evidence under O 41 R. 27

Where an important witness to the proceedings had been tendered as a witness at the trial but refused by the trial Judge on the ground that he was engaged as counsel in the case the Appellate Court can record his evidence at the appellate stage under O 41 R 27

(b) Hindu—Law—Adoption—Giving and taking—Sufficiency of evidence Jatus.

Where a widow has entered into a deed of adoption whereby she purported to have adopted as a son to her deceased husband a boy the evidence that the boy was present at the time when the sub registrar put to his father and to the widow the question whether they had executed the deed is sufficient to prove a giving and taking

(c) Privy Council—Concurrent findings of fact—Interference

Where it is not shown that the concurrent findings of fact upon certain issue have been arrived at by reason of any error of method or mistake or through neglect of any aspect of the evidence the Privy Council would not depart from the important though not inflexible rule of practice that concurrent findings of fact should not be disturbed

Messrs. *L P E Pugh S M Pringle* and *W W K Page*— For Appellants.

Messrs. *A M Dunne W Wallach C S Rewcaste Sir H S. Gour* Messrs *J M Parikh Dingle Foot Sir Thomas Strangman and Mr A G P Pullan*—For Respondents.

Solicitors for Appellants Ranken Ford and Chester

Solicitors for Respondents Hy S L. Polak & Co., Douglas & Dold and Sandeson, Lee and Co.,

[The full text of the Judgment is printed at A. I. R. 1939 P C 152—Ed.]

END

*13. Supplementary List of Pleaders.

Notification No 645/669, dated 23rd June 1939, issued by the Judicial Commissioner of Ajmer Merwara.

Annual Sanad of the following Pleaders has been renewed for the year 1939

57 Mr. Mool Chand Asawa.

58 Mr. Troloki Nath Sharma.

59. Mr Dwarka Persad Bhargava.

60 Mr Sheikh Mohammed Yusuf Qureshi†.

The following further additions have been made till December 15, 1939.—Ed., A. M. L. J.

Advocates.

80 Mr. Shyam Sunder Deedwania

81. Mr Sri Krishna Agarwal.

82 Mr. Hari Datt Ubana.

Pleaders.

61 Mr Jahangir Khan

62. Mr. Vishwa Nath Misra

14. Amanat-Nama.

Notification, dated 3rd August 1939, issued by the Judicial Commissioner, Ajmer-Merwara.

No 895/J-VII-38—In exercise of the powers conferred by section 125 of the Code of Civil Procedure, 1908 (V of 1908), the Judicial Commissioner, Ajmer-Merwara, with the previous approval of the Provincial Government, and in supersession of the Chief Commissioner's notification No 736, dated the 6th December, 1877, is pleased to make the following additions to the Civil Procedure Code with effect from the 1st September 1939.—

1 Order 21, Rule 43—Renumber this rule as sub-Rule (1) and add the following further proviso and sub-rules (2) and (3) —

*This Supplements the list printed at page 11 of the current volume —Ed A M L J

†Died—Ed A. M L J

"and provided also that, when the property attached consists of live stock, agricultural implements or other articles which cannot conveniently be removed or cannot conveniently be accommodated in any storehouse in the district and the attaching officer does not act under the first proviso to this rule, he may at the instance of the judgment-debtor or of the decree holder or of any person claiming to be interested in such property leave it in the village or place where it has been attached—

(a) in the charge of the person at whose instance the property is retained in such village or place, if such person enters into a bond in the Form No 15 A of Appendix E to this Schedule with one or more sufficient sureties for its production when called for or

(b) in the charge of an officer of the Court, if a suitable place for its safe custody be provided by any of the parties to the case free of charge and the remuneration of the officer for a period of 15 days at such rate as may from time to time be fixed by the High Court be paid in advance or

(c) in the charge of a village lambardar or such other respectable person as will undertake to keep such property subject to the orders of the Court, if such person enters into a bond in Form 15-B of Appendix E with one or more sureties for its production

(2) Whenever an attachment made under the provisions of this rule ceases for any of the reasons specified in Rules 55 57 or 60 of this order the Court may order the restitution of the attached property to the person in whose possession it was before attachment.

(3) When property is made over to a custodian under sub-clause (a) or (c) of Clause (1) the Schedule of property annexed to the bond shall be drawn up by the attaching officer in triplicate, and dated and signed by—

(a) the custodian and his sureties.

(b) the officer of the Court who made the attachment.

(c) the person whose property is attached and made over

(d) two respectable witnesses.

One copy will be transmitted to the Court by the attaching officer and placed on the record of the proceedings under which the attachment has been ordered, one copy will be made over to the person whose property is attached and one copy will be made over to the custodian"

2 Add the following forms as 15-A and 15-B to Appendix E of Schedule 1, Civil Procedure Code –

FORM NO. 15-A

Bond for safe custody of moveable property attached and left in charge of person interested and sureties.

(O 21, R. 43)

In the Court of at

Civil Suit No of

A B of *against*

C D of

Know all men by these presents that we, I J. of etc., and K L of etc, and M N. of etc, are jointly and severally bound to the Judge of the Court of in Rs to be paid to the said Judge, for which payment to be made, we bind ourselves, and each of us, in the whole, our and each of our heirs, executors and administrators, jointly and severally by these presents

Dated this day of 19 .

And whereas the moveable property specified in the Schedule hereunto annexed has been attached under a warrant from the said Court, dated the day of 19 , in execution of a decree in favour of in suit No. of 19 on the file of and the said property has been left in the charge of the said I J

Now the condition of the obligation if that, if the above bounden I J. shall duly account for and produce when required before the said Court all and every the property aforesaid and shall obey any further order of the Court in respect thereof, then this obligation shall be void. otherwise it shall remain in full force.

I J
K L
M N

Signed and delivered by the above bounden in the presence of

FORM NO 15 B

Bond for safe custody of moveable property attached and left in charge of any person and sureties

(O 21 R. 43 (1) (c))

In the Court of at
Civil Suit No of
A B of
against
C. D of

Know all men by these presents that we, I J of etc., and K L. of etc., and M N of etc., are jointly and severally bound to the Judge of the Court of in to be paid to the said Judge, for Rupees which payment to be made we bind ourselves, and each of us, in the whole our and each of our heirs, executors and administrators jointly and severally by these presents.

Dated this day of 19

And whereas the moveable property specified in the schedule hereuntn annexed has been attached under a warrant from the said Court dated the day nf 19 in execution nf a decree in favour of 19 on the file of in suit No and the said property has been left in nf the charge of the said I J

Nnw the condition nf this nbligation is that, if the above bounden I J shall duly account for and prodnce when required before the said Court all and every the property afnresnid and shall obey any further order of the Court in respect thereof then this obligation shall be void otherwise it shall remain in fnll force and be enforcible against the above bounden I J in accordance with the procedure laid down in section 145,

Civil Procedure Code, as if the aforesaid I J were a surety for the restoration of the property taken in execution of a decree

I J

K. L

M N

Signed and delivered by the above bounden in the presence of".

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15. Adjournments for Counsel's illness.

Circular No 10, dated 26th September 1939, issued by the Judicial Commissioner —

The Judicial Commissioner is pleased to direct that Judges and Magistrates should observe the following procedure where adjournments are requested on the ground of illness of counsel

A In Criminal matters — An adjournment should be granted unless there has been undue delay in notifying the fact to the Court concerned Ordinarily if illness has supervened 10 days or more before a hearing, the accused or his counsel will be required to make arrangements for a fresh counsel The fact of illness having occurred must be notified to the appropriate Court within four days of its occurrence

B In Civil matters — All Courts should fix dates in consultation with counsel where possible. Where application is made and adjournment requested on the ground of illness of counsel adjournment shall ordinarily be granted unless inordinate delay has occurred between the onset of the illness and the date of receipt of the application A delay of 15 days is inordinate delay Courts are reminded that when adjournments are granted the costs of the hearing are within the discretion of the Court and may be awarded to either side They should ordinarily be so awarded where undue or deliberate slackness or delay has occurred on either side Medical certificates need not be produced by Public Prosecutors, Government Pleaders, Berristers and Advocates but this does not absolve them from making applications for adjournments for illness If applications for adjournment are made on false pretexts of illness action may be taken against the offender under Section 14 (b) of the Rules for the Enrolment of Advocates and Pleaders

16 Summons to Istimrardars.

Circular No 11 L I 38 dated 27th October 1939 issued by the Judicial Commissioner

In view of the fact that the practice of sending summons to Istimrardars is not consistent in the Courts of this Province, the Judicial Commissioner is pleased to order that in future summons to Istimrardars should issue in the form below —

From

(Judge)

To

(Istimrardar—Append his proper title as set out in Local Rules and Orders" Volume III Page 420)

(Description of the suit)

Sir

I have the honour to state that your attendance is required to give evidence on behalf of the in the above suit. You are therefore requested personally to appear before this Court on the day of 19 at o clock in the forenoon.

I have the honour also to inform you that if you fail to comply with this order without lawful excuse you will be subject to the consequences of non attendance as provided in rule 12 of Order XVI of the Code of Civil Procedure 1908 Travelling and subsistence allowance are payable to you on your appearance

Would you kindly acknowledge receipt of this letter on the attached form and return it to me retaining the duplicate letter for your own use

I have the honour to be

Sir

Your most obedient servant,

Judge

Form of Acknowledgment.

Received a letter No dated from on

Signature of the Istimrardar

This should be sent to the Istimrardar in duplicate and he should be served personally where possible.

18. Reorganisation of Civil Jurisdiction.

Number B 640-51-iv-B, dated 19th January 1939, issued by the Commissioner, Ajmer-Merwara.

Subject.—Reorganisation of the Civil Jurisdiction of the District of Ajmer-Merwara

Memorandum.—

In order to improve and expedite Civil Justice, to enable revenue officers to concentrate on revenue administration, the Government of India have been pleased to sanction the following proposals —

(*a*) The powers of a Sub Judge conferred on (1) the Assistant Commissioner, Ajmer-Merwara, (2) the Extra Assistant Commissioner, Merwara, (3) the Sub Divisional Officer, Kekri, (4) the General Manager Court of Wards, (5) the Treasury Officer, Ajmer and (6) the Income-Tax Officer, Ajmer-Merwara, and the powers of a Munsiff conferred on the Tahsildars, and Naib Tahsildars in the district, will be restricted to the trial of rent suits only, and the jurisdiction conferred on these Courts to try Civil cases of other kinds will be cancelled

(*b*) The post of Registrar, Small Cause Court, Ajmer will be abolished and a new post of Additional Sub Judge, Ajmer, created

(*c*) In future, the provincial Judges concerned in the disposal of Civil litigation outside the Judicial Commissioner's Court and the District Court will be known by the following designations —

(*i*) The Small Causes Court Judge, Ajmer
(*ii*) The Sub Judge, Ajmer.
(*iii*) The Additional Sub Judge, Ajmer
(*iv*) The Sub Judge, Beawar.

Apart from the work at present performed by the Munsifs these four Judges will be responsible for all Small Cause Court and Civil subordinate work in the district, with the exception of original Civil suits exceeding Rs 50,000/- in jurisdiction value, which will be heard by a judge of the District Court The duties of the above four judges will be allocated as follows —

(*i*) The Small Cause Court Judge, Ajmer, will hear all Small Cause Court work of the Ajmer sub-division, excepting Nasirabad Cantonment. He will also hear special jurisdiction civil suits, the valuation of which for jurisdiction purposes is from Rs 10,000 to Rs. 50,000 in the Ajmer sub-division

(*ii*) The Sub-Judge Ajmer, and the Additional Sub Judge, Ajmer, will hear all the remaining civil work of the Ajmer Sub-Division except Nasirabad

Cantonment and will also hear special jurisdiction Civil suits the valuation of which for jurisdiction purposes is from Rs. 5,000 to Rs. 10 000 The allocation of work between these two Sub Judges will be done by the judge, Small Cause Court Ajmer

(iii) The Sub Judge Ajmer, will hear all the Small Cause Court cases and other civil work of Kekri sub-Division, and also special jurisdiction civil suits from Rs. 5 000 to Rs 50 000 which may arise in the Kekri sub-division He will spend for this purpose so much time at Kekri as may be decided by the Judicial Commissioner Ajmer Merwara, to be necessary

(iv) The Sub-Judge Beawar will hear all the Small Cause Court cases and other Civil work of Beawar sub-division and Nasirabad Cantonment and also all special jurisdiction suits from Rs. 5 000 to 50 000 which may arise in these areas. For Nasirabad work he will spend at Nasirabad so much time as may be decided by the Judicial Commissioner to be necessary

(d) The powers of a District Court for insolvency purposes conferred on the judge, Small Cause Court, Ajmer and the Sub Judge Beawar will be withdrawn The insolvency work of the whole District will be heard by one of the two District Judges viz the whole time District Judge whose appointment is contemplated (and pending his appointment, the the temporary second Additional District Judge) Ajmer Merwara.

(e) The work of the District Judge for Railway lands at present performed by the Extra Assistant Commissioner Beawar and the City Magistrate, Ajmer (vide late Foreign and Political Notification No. 332 I.B dated the 4-6-1936) will be entrusted to one of the two District Judges mentioned in (d) above

(f) The District and Sessions Court powers of all the residents and the Political Agents in the states of Rajputana will be withdrawn and the work entrusted to the District and Sessions Judge, Ajmer Merwara.

(2) It is proposed to bring into force the proposals (a) to (e) above with effect from the 1st March 1939 and the necessary orders are being issued by the Local Administration. In the mean time you should take necessary steps to notify to the parties any alterations in the dates for the hearing of suits that may be found necessary and to have your boards prepared accordingly

(3) The Judicial Commissioner has provisionally fixed that the Sub Judges, Ajmer and Beawar should stay at Kekri and Nasirabad respectively for two consecutive weeks every two months. If in practice the period turns out to be too long or too short it can be altered later The Judges themselves should fix the actual dates on which they will sit at Kekri and Nasirabad

19. Civil Jurisdiction

Number B. 4309-33/iv-(b)-1, dated May 6, 1939, issued by the Commissioner.

Chart showing the distribution of civil judicial business in Ajmer-Merwara

(This is the same as the chart printed at page 7 of the current volume but with certain addition, Ed., A. M. L. J.)

Name of Court.	Powers	Authority	Area of jurisdiction.	Authority	1st appeal heard by	2nd appeal heard by	Remarks
2	3	4	5	6	7	8	9
Honorary Munsiff, Sawar	Munsiff civil suits upto Rs 100/- vide Section 9(3) of the Ajmer Courts Regulation IX of 1926	The Hon'ble the C C 's Notification No 559, dated the 22-4-1919	Within the limits of Sawar Estate	The Hon'ble the C C 's Notification No 559, dated the 22-4-1919	No 8 vide Section 12 (a) of the Ajmer Courts' Regulation IX of 1926 and the Hon'ble the C C 's Notification No 561-C, dated the 21-3-1914	No 17 vide Section 14 of Regulation IX of 1926	The Istimrari Estates where there are Honorary Sub Judges and Munsiffs are excluded (vide Hon'ble the C C 's Notification No. 738-C/217-A/38, dated the 14 2 1939) so far as cases triable by them are concerned, from the Jurisdiction of those small cause courts which would otherwise have jurisdiction over them
Honorary Munsiff, Tantoti	Do.	No 1451/269-IV, dated the 27-9 1923	Within the limits of Tantoti Estate	No 1151/269-IV, dated the 27-9-1923			
Honorary Munsiff, Kerote	Do	No 1532/269 IV, dated the 3-10 1923	Within the limits of Kerote Estate	No 1532/269-IV, dated the 3-10-1923			
Honorary Munsiff, Bhinai	Do	No 1342/65-CC/32, dated the 6-12-1934	Within the limits of Bhinai Estate	No 1342/65 CC/32, dated the 6 12-1934			
Honorary Munsiff, Kalan.	Do	No 286-C/65-CC/32-II, dated the 30-12-1936	Within the limits of Mehrun Kalan Estate	No 286 C/65-CC/32-II, dated the 30-12-36			

Name of Court.	Powers.	Authority	Area of Jurisdiction.	Authority	1st appeal heard by	2nd appeal heard by	Remarks.
2	3	4	5	6	7	8	9
Honorary Munsiff Junia.	Do	No 80-A/37 II dated the 17-8-1937	Within the limits of Junia Estate	No 80-A/37 II dated the 17 8-1937	Do.	Do.	Do
Honorary Sub-Judge Masuda.	Sub Judge II Class (suits upto Rs 5000 vide Section 9(2) of Regulation IX of 1926	No 401 A/37 dated the 5-7 1937	Within the limits of Masuda Estate	The Hon ble the C. C s Notification No 401 A/37 dated the 5-7 1937	(1) No 14 if the amount or value of the subject matter is less than five thousand (vide Section 12(b) of Regulation IX of 1926) (2) and to No 17 if the amount or value of the subject matter is five thousand (vide Section 12(c) of Regulation IX of 1925)	(1) No. 17 vide Section 14 of Regulation IX of 1926)	
3 Judge Small Cause Court Ajmer	(1) Judge Small Cause Court	(1) Hon ble the C C. s Notification No. 738-C/217 A/38 dated the 14-2-1939	(1) Ajmer Sub-Division excl ding Nasirabad Cantonment.	The Hon ble the C. C. s Notification No 738-C/217 A/38 dated the 14-2 1939	No appeal.	Revision to No. 17 vide Section 25 of the Provincial Small Cause Court Act IX of 1887	

Civil Jurisdictiou—Chart (*Continued*).

Name of Court	Powers	Authority	Areas of Jurisdiction	Authority	1st appeal heard by	2nd appeal heard by	Remarks
2	3	4	5	6	7	8	9
	(2) Sub Judge, First Class	(2) Hon'ble the C C 's Notification No 559 C, dated the 21-3-1914	(2) All special jurisdiction civil suits, the valuation of which for jurisdiction purposes is above Rs 10 000/- and not exceeding Rs 50,000/- arising in the Ajmer Sub-D vision excluding Nasirabad Cantonment	(a) The Hon'ble the C C s Notification No 737—C/217-A/38, dated the 14-2-1939 (b) The Distr ct Judge's order No B 3892-3916, dated 18-4-1939	No 17 vide Section 12(c) of Regulation IX of 1926		
Sub-Judge, Ajmer	Sub-Judge 1st Class (suits upto Rs 10 000/- vide Section 9(1) of Regulation IX of 1926)	Notification No 559-C dated the 21-3-1914	Ajmer Sub-division excluding Nasirabad Cantonment and Bagsuri Estate		(1) No 14 if the amount or value of the subject matter is less than five thousand rupees (vide Section 12 (b) of Regulation IX of 1926) and (2) to No 17 if the amount or value of the subject matter is five thousand rupees or upwards (vide Section 12(c) of Regulation IX of 1926)	(1) to No 17 vide Section 12 c) of Regulation IX of 1926	
Additional Sub-Judge Ajmer	Do	Notification No 306/217-A/38, dated the 1-3-1939	The allocation of work between these two Sub-Judges will be made by the Judge, Small Court, Ajmer	District Judge's Order No B-3892-3916, dated the 18-4-1939			

Civil Jurisdiction—Chart (*Continued*)

Serial No.	Name of Court.	Powers.	Authority	Area of jurisdiction	Authority	1st appeal heard by	2nd appeal heard by	Remarks.
1	2	3	4	5	6	7	8	9
11	Sub-Judge Ajmer	(1) Judge Small Cause Court.	Hon ble the C C s Notification No 738-C/217 A/38 dated the 14-2-1939	Kekri Sub-division	Hon ble the C. C s Notification No 738 C/217 A/38 dated the 14-2 1939	No appeal.	Revision to No 17 vide Section 25 of the Provincial Small Cause Court Act IX of 1887	For cases of Kekri Sub-division he will hold his Court at Kekri.
		(2) Sub-Judge 1st Class.	Notification No 559-C dated the 21 3-1914	(1) Kekri Sub-division	(1 District Judge s order No B-5892 3916 dated the 18-4-1939	(i) to No 14 if the amount or value of the subject matter is less than five thousand rupees vide Section 1..(b) of Regulation IX of 1926)	(i) to No 17 vide Section 12(c) of Regulation IX of 1926	
				(2) All special jurisdiction civil suits the valuation of which for jurisdiction purposes is above Rs 10 000/ and not exceed ng Rs. 50 000/ arising in the Kekri Sub-division.	(2) Hon ble the C C s Notification No 737-C/217 A/38 dated the 14-2 1939	(ii) to No 17 if the amount or value of the subject matter is or exceeds five thousand rupees (vide Section 12(c) of Regulation IX of 1926).		

Civil Jurisdiction—Chart (*Continued*)

Name of Court	Powers	Authority	Area of jurisdiction	Authority	1st appeal heard by	2nd appeal heard by	Remarks
2	3	4	5	6	7	8	9
Sub-Judge, Beawar.	(1) Judge, Small Cause Court	Hon'ble the C C 's Notification No 738-C/217-A/38, dated the 14-2-1939	(1) Beawar Sub-division and Nasirabad Cantonment	Hon'ble the C C 's Notification No 738-C/217-A/38, dated the 14-2-1939,	No appeal	Revision to No 17 vide Section 25 of the Provincial Small Cause Court Act IX of 1877	For cases of Nasirabad Cantonment he will hold his Court at Nasirabad
	(2) Sub-Judge 1st Class	(2) Notification No 559 C dated the 21-3-1914	(a) Beawar Sub-division and Nasirabad Cantonment	(1) District Judge's Order No B-3892-3916, dated the 18-4-1939	(i) to No 14 if the amount or value of the subject matter is less than five thousand rupees (vide Section 12 (b) of Regulation IX of 1926)	(i) to No 17 vide Section 12(c) of Regulation IX ot 1926	
			(b) All special jurisdiction civil suits the valuation of which for jurisdiction purposes is above Rs 10,000/- and not exceeding Rs 50,000 arising in the Beawar Sub-division and Nasirabad Cantonment	(2) Hon ble the C C 's Notification No 737-C/217-A/38, dated the 14-2-1939	(ii) to No 17 if the amount or value of the subject matter is or exceeds five thousand rupees (vide Section 12'c) of Regulation IX of 1926)		

Civil Jurisdiction—Chart (*Continued*)

Serial No	Name of Court	Powers	Authority	Area of Jurisdiction	Authority	1st appeal heard by	2nd appeal heard by	Remarks
1	2	3	4	5	6	7	8	9
13	General Manager Court of Wards Ajmer	Sub-Judge Class.	1st Notification No 1283-C C dated the 22 7 1927	Dagauri Estate (when the post of the General Manager is held by Rao Bahadur Thakur Onkar Singh)	District Judge s Order No B-3892-3916 dated the 18-4-1939	Do	Do	
14	Additional District Judge, Ajmer	(1) District Judge.	The Hon ble the C. C. s Notification No. 623-C dated the 27 3-1914	(14) Ajmer Merwara.	No 14-Section 6 of the Ajmer Courts Regulation IX of 1925			
15	2nd Additional District Judge, Ajmer	(2) District Courts for Insolvency work	Section 3 of the Provincial Insolvency Act 1920.	(15) Such cases as may be transferred to him by No 14	No. 15 Hon'ble the C. C s Notification No 643/83-A/37/ dated the 22 4-1939	No 17 vide Section 12 (c) Regulation IXof 1926		
16	Commissioner Ajmer-Merwara.	District Judge	Section 4 of the Ajmer Courts Regulation IX of 1926.	Ajmer Merwara.	Section 4 of the Ajmer Courts Regulation IX of 1926.	No 17 vide Section 12(c) of Regulation IX of 1926		
17	Judicial Commissioner Ajmer-Merwara.	High Court.	Section 3(2) of the Regulation IX of 1926	Ajmer Merwara.	Section 3(2) of the Regulation IX of 1926.			

20. Amendments to Criminal Jurisdiction.

No B 12835/IV-c-1, dated the 14th November 1939, issued by the Commissioner.

The following amendments are made in the statement showing the criminal jurisdiction of the various courts in Ajmer-Merwara, issued vide this office endorsement No B 5596-5635/IV(c)-1, dated the 31st December, 1938 —In the column "Area within which the court will exercise Powers" against entries Nos 23-Extra Assistant Commissioner, Merwara and 24(a)-Assistant Commissioner, Ajmer-Merwara, add the words "excluding Railway limits" after the words "Beawar Sub division" and "Ajmer Sub-Division" respectively.

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21. Profiteering.

Proclamation issued by the Commissioner on September 8, 1939

The Commissioner is informed that gross profiteering is being carried on in the district of Ajmer-Merwara, and that traders are taking undue advantage of the situation arising out of the war Traders are hereby warned that profiteering will be punished No unjustifiable increase of prices will be allowed, and traders are advised immediately to reduce their prices to the level at which they stood at the beginning of September There is no reason why the existing stocks of imported goods should be increased in price

Refusal to sell goods in the hope that prices will rise is also punishable.

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22. Shariat Declaration Rules.

Notification, dated 13th October 1939, issued by the Chief Commissioner, Ajmer-Merwara—Published at P 654 of the Gazette of India Part II-A

No 1518/237-A/38.—In exercise of the powers conferred by section 4 of the Muslim Personal Law (Shariat) Application Act, 1937 (XXVI of 1937), read with the Government of India, Home Department, Notification No 200/38- Judicial, dated the 15th July, 1939, the Chief Commissioner is pleased to make the following Rules for carrying into effect the purposes of the said Act —

1 *Short title*—These Rules may be called the Ajmer Merwara Muslim Personal Law (Shariat) Declaration Rules, 1939

2 In these Rules, unless there is anything repugnant in the context Act means the Muslim Personal Law (Shariat) Application Act, 1937

3 Declaration under section 3 sub-section (1) of the Act shall be in the form printed in the Schedule hereto annexed and shall be filled by the declarant personally or through an agent appointed in accordance with section 33 of the Indian Registration Act, 1908

4 A declarations under section 3 sub-section (1) of the Act shall be filed in the Court of the Subordinate Judge in whose jurisdiction the declarant ordinarily resides or carries on business and this Subordinate Judge shall be the prescribed authority referred to in section 3

5 Under the provisions of section 3 sub-section (2) of the Act w ere the Sub-ordinate Judge having jurisdiction refuses to accept a declaration under sub-section (1) the person desiring to make the same may appeal to the District Judge, who shall decide the matter finally in accordance with the directions laid down in the above section.

6 The provisions of the Code of Civil Procedure, 1908 shall apply as far as possible to all proceedings under section 3 of the Act.

7 (1) If the declarant is, on account of bodily infirmity or other sufficient cause, unable to attend Court or is a person who does not by custom appear in public, or is exempted by Government from appearance in Court the Subordinate Judge may at his discretion and for reasons to be recorded by him in writing on the declaration accept his declaration and record his statement at his residence.

(2) Where the Judge considers necessary a commission may be issued for the examination of any witness in connection with the making of any declaration

8 The following fees shall be levied and paid at such times and in such manner as is hereinafter laid down—

(1) for filing a declaration under section 3 sub-section (1) Rs. 2/

(2) for filing an appeal under section 3 sub-section (2) Rs. 5/

(3) for attendance of the Sub-ordinate Judge at the private residence of the declarant ... Rs. 5/- in addition to conveyance charges.

The fees shall be payable in advance in the form of Court Fee stamps to the Officer before whom the declaration or the appeal is to be be filed The conveyance charges shall be payable also in advance and in cash.

9 No declaration shall be accepted and no private residence attended until the requistes fee and conveyance charges have been paid.

10. Application for copies in connection with these proceedings shall be made and dealt with in accordance with Court Rules governing the grant of copies in civil matters so far as such Rules are applicable.

Schedule.

I, , son/daughter of , aged , resident of of , Police station , Tahsil , District Ajmer-Merwara, being a Muslim resident of British India and competent to contract within the meaning of section 11 of the Indian Contract Act, 1872, do hereby declare that I desire to obtain the benefit of the Muslim Personal Law (Shariat) Application Act, 1937, so that the provisions of section 2 of the said Act shall apply to me and all my minor children and their descendants as if adoption, wills and legacies were specified in that section in addition to the matters enumerated therein

Dated

1 Signature of Declarant

2 Signature of the person or persons identifying the declarant, with particulars of his or their parentage, caste and address

Certified that the signature of the declarant and the person or persons identifying him/her were appended before me at on the forenoon/afternoon of the 19 .

(Signature of attesting authority)

23 Amendment in Payment of Wages Rules.

Notification dated 30th June 1939 issued by the Chief Commissioner —Printed in Gazette of India Part II A for July 8 1939 at page 422

No 1061/7-A/37 —In exercise of the powers conferred by section 26 of the Payment of Wages Act 1936 (IV of 1936) as adapted by the Government of India (Adaptation of India Laws) Order 1937 read with the Government of India, Home Department Notification No F 126/37 Public dated the 1st April 1937 the Chief Commissioner is pleased to make the following amendments in the Ajmer Merwara Payment of Wages Rules 1937 published in this Administration s Notification No 7 A/37 dated the 18th January 1937 —

Amendment

I For the existing Rule 18—Annual Return—the following shall be substituted —

18—*Annual Return* —A return showing any deductions made from wages on account of fines breach of contract and damage or loss, during the calendar year shall be sent by evey factory subject to the Act in Form IV (Deductions from wages) so as to reach the Chief Inspector of Factories not later than the 15th February following the end of the calendar year to which it relates.

II For the words "Total number of persons employed" occuring in item 2 in Form IV (Deductions from wages) the words Average number of persons employed daily shall be substituted and in item 3 in the same Form for the words "Total wages paid the words 'Total wages paid including deductions under clauses (d) to (j) of sub-section 2 of section 7 but not other deductions' shall be substituted.

24 Holidays during 1940

Notification dated 14th October 1939 issued by the Chief Commissioner—Printed in Gazette of India Part II A for October 21 1939 P 654

No. 1542/217 A/37 —It is hereby notified that all courts offices and educational institutions under the Chief Commissioner Ajmer Merwara, will be closed on the days named in the list below which will be observed as public holidays in the year 1940—

Classification of Holidays	Name of Holiday	Date in 1940,	Days of the week.	No of days
All Creeds	New Year's days .	1st January	Monday .	1
Mohammedan	Id-ul-Zuha	20th January ..	Saturday .	1
Do	Moharrum	17th to 19th February	Saturday to Monday	3
Hindus .	Shiv Ratri	7th March	Thursday	1
Christian ..	Good Friday	22nd March .	Friday .	1
Hindus .	Holi	23rd and 24th March	Saturday & Sunday	2
Christian	Easter Monday	25th March .	Monday .	1
Hindus	Sil Saptmi	30th March	Saturday ...	1
Mohammedan	Barawafat .	21st April	Sunday .	1
Hindus ..	Baisakhi fair .	21st May .	Tuesday . .	1
All Creeds	Empire day	24th May	Friday ..	1
Do	King Emperor's Birthday	13th June ..	Thursday ...	1
Mohammedan	Urs Khwaja Sahib	10th and 11th August	Saturday & Sunday	2
Hindus .	Raksha Bandhan	17th August .	Saturday . .	1
Do	Janam Ashtami	26th August .	Monday ..	1
Do	Jaljhulni Ekadashi	12th September	Thursday . .	1
Do	Anant Chaturdashi	15th September .	Sunday . .	1
Mohammedan	Shab-i-Barat .	17th September .	Tuesday ...	1
Hindus	Dasehra .	8th to 10th October .	Tuesday to Thursday	3
Do	Dipmalika .	30th and 31st October	Wednesday and Thursday	2
Do	Yamdwitiya	1st November .	Friday ...	1
Mohammedan	Id-ul-Fitr ..	2nd November .	Saturday . .	1
Hindus	Pushkar fair	11th to 16th November	Monday to Saturday	6
Christian	Christmas	24th to 31st December	Tuesday to Tuesday	8

NOTE—1 The last Saturday in each month may be observed as a holiday at the discretion of the Heads of Office

2 The Treasury Office, Ajmer, shall be closed on the last day of each month (excluding March) for the purpose of transactions

3 Mohammedan holidays depend on the moon being visible and fall on the day following such event

4 Holidays may be granted in Ajmer-Merwara on the occasion of Local festivals and fairs at the discretion of the Commissioner, Ajmer-Merwara

5 The Civil Court vacations shall consist of 42 days in the months of May and June and the actual dates shall be fixed and notified by the Judicial Commissioner, Ajmer-Merwara During this period the Courts of the Judge, Small Causes and Sub-Judges will be entirely closed and those of the District Judge and Munsiffs, Sub Judges and Judges Small Causes discharging executive or criminal work in addition to their civil function will remain closed for civil work only

6 The last Friday of Ramzam and Friday the 9th August 1940 will be observed as holiday for Mohammedans

7 With the previous approval of the Superintendent of Education, Delhi, Ajmer-Merwara and Central India, seven days during the whole year will be allowed to each Government educational institution for the observance of special and local holidays

8 The Moinia Islamia High School, Ajmer, will observe such holidays during the year as may be decided by the Convenor of the School provided that the total number of holidays does not exceed the maximum number of holidays, *viz*, 105 allowed to the other local educational institutions of the same status

25 Bank Holidays during 1940

The following dates have been declared to be holidays to be observed by the Imperial Bank of India Ajmer Branch under Negotiable Instruments Act—Vide Notification No 1631/217 A/37 dated 3rd November 1939—Printed in Gazette of India Part II A for November 11 1939

—Ed A M L J

January 1 20*	July Nil
February 17*—19*	August 10* 11* 17 26
March 7 22, 23 25, 30	September 9 12, 17*
April 21	October 8—10 30 31
May 21* 24	November 1 2* 14—16*
June 13 29	December 24—26, 30, 31

*Subject to the appearance of the Moon

The Bank will be closed for *Treasury Business* on last Saturday and on the last working day of each month excluding March

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26. Amendment to Rules for Enrolment of Advocates and Pleaders

Notification dated 8th November 1939 issued by the Judicial Commissioner—Printed in the Gazette of India Part II A for November 18 1939 at page 712

No. 1399/J.-XXXIV-39—With the previous approval of the Provincial Government, the Judicial Commissioner has been pleased to make the following amendment to the Rules for the enrolment of Advocates and Pleaders The amendment shall have effect from 1st December 1940

1 *Add* the following as clause (iii) to Rule 7 —

(iii) The Judicial Commissioner may impose a penalty not exceeding the amount of the fee payable if default is made in renewing a Sand granted under rule 4 (2)

2 For Appendix I *substitute* the following —

IN THE COURT OF THE JUDICIAL COMMISSIONER,
AJMER MERWARA.

To

residing at

WHEREAS you have applied to be admitted an Advocate in the Courts of the Province of Ajmer Merwara and have satisfactorily proved

that you are qualified for the office by education, ability, good character and otherwise,

NOW THEREFORE in Conformity with the Rules published in Judicial Commissioner's Notification No 246/J.-IV (a), dated the 21st February 1935, you are authorized to practise as an ADVOCATE in all the Courts of the Province of AJMER-MERWARA including the court of the JUDICIAL COMMISSIONER, upon the following conditions·—

(1) THAT YOU maintain a strict standard of PROFESSIONAL CONDUCT,

(2) THAT IF YOU are appointed to an office under Government you will cease to practise unless specially so authorized ;

(3) THAT YOU employ no clerk who is not registered as a fit and proper person in the register of Pleader's clerks,

(4) THAT YOU surrender this SANAD (1) if you are suspended (2) if this SANAD is revoked temporarily or permanently, or (3) if you are dismissed from GOVERNMENT SERVICE

YOU are not liable to be removed from your office during your good behaviour provided you discharge your duties with zeal and integrity in accordance with the Rules which now are or may hereafter be in force.

For breach of any of these conditions or for other grave reasons, which may include participation in any disloyal movement, this SANAD is liable to be revoked by the JUDICIAL COMMISSIONER.

Dated Ajmer, 19 .

Seal.

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27 Terms of Judicial Commissioner's Sessions during 1939.

During 1939, the Judicial Commissioner held the court at Ajmer during the following periods —Ed.

Mr. D. R. Norman .

7th March 1939 to 13th April 1939.

Mr R. W H Davies

11th July 1939 to 13th August 1939.

3rd October 1939 to 31st October 1939

28 References to certain Notifications

(The references to certain Notifications are given below These notifications are printed in the Gazette of India Part I A for 1939 on the pages mentioned against each Notification—Ed A M L J)

1 Qualification of a Holder of a certificate proving that he has passed the Upper Primary (IV Standard) Examination or its equivalent to be a voter at Municipal Elections —P 79

2 Assistant Commissioner and Extra Assistant Commissioner authorized to hear Municipal Election Petitions transferred to them—P 95

3 Rules for Election of Members under S 14 of Durgah Khawaja Saheb Act—111

4 Rearrangement of Jurisdiction of Civil Courts—P 113

5 Disposal of work by the Bench of Honorary Magistrates in Nasirabad.

6 Rules for regulating the issue of licenses for the sale of spirits and liquors—P 124

7 Municipal Election Rules—P 156

8. Rules under Durgah Khawaja Sahib Act—P 162

9 Further amendments in the Partnership Rules—P 184

10 Factories Rules—P 204

11 Judicial Powers for Civil Courts—P 262

12 List of Municipal members for Ajmer Municipality—P 288

13 Regulation of cycle traffic within Beawar Municipal limits—P 289

14 Bye laws regarding registration of births, deaths and marriages in Beawar Municipality—P 342.

15 Superintendent of District Police, Ajmer-Merwara appointed Registration Officer for Ajmer Merwara under R. 3 of the Registration of Foreigners Rules 1939—P 422

16. Arms Rules—Amendments and Notifications—P 480.

17 Rules for the Improvement of sanitation in certain villages—P 541

18 Superintendent of Police appointed 'Civil authority' under foreigners' Order—P 546

19 Rates of Excise duty on medicinal and other preparations containing rectified spirit manufactured in India when they are imported within the limits of Ajmer-Merwara District—P 586.

20 Rules for the supply and Distribution of stamps—P 642

21 Places specified to prevent the entry of certain unauthorised persons under Rule 7 of the Defence of India Rules, 1939—P 673.

22 'Competent authority' named for certain protected places under R 9 of Defence of India Rules, 1939—P 674

END

REVIEW

Indian Limitation Act (1908)—*by V V Chitale and K N Annaji Rao Published by All India Reporter Ltd., Nagpur First Edition, Vol III, 1939—PP 1953 to 3064*

The volume marks the happy conclusion of the masterly treatise on Limjtation Act by the talented authors. The volume contains commentary on SS. 141 to 183 from Pages 1953 to 2630 and the same articles with synopsis in Parallel columns from pages 2637 to 2652

A very exhaustive Index covering about 400 pages is given at the end.

The standard of the first two volumes is maintained throughout this volume. The set is a very useful contribution to Legal Publications. We congratuted the authors and publishers on their resourcefulness and enterprsie We are looking forward to the second edition of the set

I S G

THE
AJMER-MERWARA
LAW JOURNAL

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1939.

Judicial Commissioners

MR. D R NORMAN, I C S
(Up to May 8, 1939)

MR R W H DAVIES, I C.S
(From May 9, 1939)

NOTE —*This volume contains judgments pronounced between September 1938 and December 1939*

Ajmer-Merwara Law Journal Committee.

1 Mr Javandlal Dutt Chowdry
2 Mr Dharmendra Vir Shivahare
3 Mr Jyoti Swarup Gupta *(Convener)*

The Ajmer-Merwara Law Journal
1939

Contents

This Volume contains two Sections, *e g* REPORTS *and* NOTIFICATIONS. *They are arranged in the order given above. Each section has a separate paging.*

1. Section I—Reports (*PP. 1—168*).

'Alphabetical Index of Cases Reported' is given at PP. iii and iv and "Subject Index of Cases Reported" at PP. v to xv

2. Section II—Notifications (*PP. 1—41*).

List of Local Cases

Followed, Distinguished or Not Followed

in

Ajmer-Merwara Law Journal for 1939

1934 A M L J 70 Ram Chandra v Radha Kishan	Dist in 1939 A. M L. J 29 (*As applicable only for Damdupat and not interest on interest*) Foll in 1939 A M L J 161 (*Re Damdupat*)
1935 A M L. J 14 Narsingh Das v Ram Kanwar	Not Foll in 1939 A. M L. J 137 (*Re suit on Khata Baqi*).
1936 A M L J 180 Imarti v Champa Lal	Not. Foll. in 1939 A. M L J 137 (*Re Suit on Khata Baqi*)
1936 A. M L J 37 Onkar Ballabh v Gurwar Lal	Foll. in 1939 A. M L. J 123 (*Re Suit on original cause of action when promissory note is admissible*)
C. R. A. No 97 of 1931 Chand Mal v Mst. Hagami	Foll in 1939 A. M L. J 102 (*Re materials of house in Istimrari estates being attachable.*

The Ajmer-Merwara Law Journal, 1939.

Alphabetical Index of Cases Reported.

The Ajmer-Merwara Law Journal

1939-Vol. XIII.

SUBJECT-INDEX OF CASES REPORTED.

Civil Procedure Code (V of 1908) (Contd.):

Criminal Procedure Code (V of 1898) (Contd):

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